

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE
COUNCIL, et al.,

Plaintiffs,

v.

KIRK C. RODGERS, etc., et al.,

Defendants.

NO. CIV. S-88-1658 LKK

ORDER ON MOTION FOR
SUMMARY JUDGMENT RELATING
TO THE ENDANGERED SPECIES
ACT

Pending before the court is plaintiffs' motion for summary
adjudication as to liability on their claims relating to the
Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 et seq.¹

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¹ During the January 20, 2005 Status Conference, the parties represented to the court that it was in the interest of the parties to first resolve all the liability issues before turning to remedies. The parties also stated their preference that the court first resolve causes of action relating to liability under the Endangered Species Act before turning to the remaining causes of action. Consequently, this order covers only the plaintiffs' ESA claims, or causes of action four through six of the seventh amended complaint.

1 Plaintiffs allege that the United States Bureau of Reclamation
2 ("Bureau" or "BOR"), the National Marine Fisheries Service
3 ("NMFS"), and the Fish and Wildlife Service ("FWS") failed to
4 examine critical issues in their biological opinions before
5 executing twenty-five year water contracts in late 2000 for the
6 delivery of California Water Project water to over two dozen
7 irrigation and water districts in the Friant, Hidden, and
8 Buchanan units.

9 The Friant defendants bring a cross-motion for summary
10 adjudication and the federal defendants have filed an opposition
11 to the plaintiffs' motion.²

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17 ² Defendant-Intervenors (San Luis & Delta-Mendota Water
18 Authority and Tehama-Colusa Canal Authority) ("intervenors") have
19 also filed a "motion for summary judgment." Plaintiffs' objection
20 to intervenors' statement of undisputed facts ("SUF") is sustained.
21 Intervenors have filed two statements of undisputed facts, one
22 submitted on October 7 with their motion for summary judgment, and
23 one on November 19, 2004, with their opposition. Intervenor's
24 first appropriately filed SUF and corresponding motion for summary
25 judgment addressed plaintiffs' third, seventh, and eight causes of
26 action, which were dismissed in the court's January 25, 2005 order.
Intervenors' motion for summary judgment filed during this round
of briefing relies on the second filed SUF on November 19, 2004,
a submission which violates Local Rule 56-260. Consequently, the
court will not entertain intervenor's arguments in this round of
briefing. The court has examined the intervenors' "motion for
summary judgment" and determines they will not be prejudiced by
this order as their arguments are adequately represented by the
Federal and Friant defendants.

I.

UNDISPUTED FACTS³

A. BACKGROUND

The Bureau's operation of Friant Dam dried up many miles of the San Joaquin River, destroying the historic fish populations. Pls.' SUF 1, citing NRDC v. Patterson, 333 F.Supp.2d 906, 924 (E.D. Cal. August 27, 2004). The Bureau's operation of Friant Dam also extirpated numerous species of native fish from the upper San Joaquin River, including spring- and fall-run Chinook salmon.

The operation of the Dam has supported irrigated agriculture through a large swath of the San Joaquin Valley. Pls.' SUF 2, 3, citing NRDC v. Patterson, id. The Bureau delivers the diverted waters of the San Joaquin to more than two dozen irrigation and water agencies that are represented in this litigation by the Friant defendants. It presently makes these deliveries under long-term water supply contracts that provide for the Bureau annually to divert, impound, and deliver up to 2.14 million acre-feet to the contractors per year. Pls.' SUF 4.

After a number of renewed contracts were rescinded as a result of this court's order in 1997 (affirmed by the Ninth Circuit in 1998), the Bureau delivered water to the Friant contractors pursuant to short term, or "interim" contracts,

³ All facts are undisputed unless otherwise noted.

1 which plaintiffs did not challenge. Pls.' SUF 5.

2 **B. RENEWAL OF CONTRACTS IN 2001 & AGENCY CONSULTATION**
3 **UNDER ESA**

4 **1. ESA Consultation on the Friant District Contracts**

5 In late 2000, the Bureau determined to execute a new round
6 of water contracts.⁴ Pls.' SUF 6, citing FWS AR 06017924.

7 In a July 2000 electronic-mail ("e-mail") message from
8 Frank Michny, an employee of the Bureau, to Cay Goude, a FWS
9 employee, explained that "everyone in the dept up to/including
10 Leshy want [sic] the contract renewals this year." Pls.' SUF 6,
11 ////

12 _____
13 ⁴ The "Friant contracts" that plaintiffs seek to invalidate
14 in this litigation are: Arvin-Edison Water Storage District
15 (14-06-200-229A-LTR1); Chowchilla Water District - Friant Division
16 (I75r-2358-LTR1); Delano-Earlimart Irrigation District
17 (I75r-3327-LTR1); Exeter Irrigation District (I75r-2508-LTR1);
18 Fresno County Waterworks District No. 18 (14-06-200-5904-LTR1);
19 Fresno Irrigation District (14-06-200-1122A-LTR1); Garfield Water
20 District (14-06-200-9421-LTR1); Gravelly Ford Water District
21 (1-07-20-W0242-LTR1); International Water District
22 (14-06-200-585A-LTR1); Ivanhoe Irrigation District
23 (I75r-1809-LTR1); Lindmore Irrigation District (I75r-1635-LTR1);
24 Lindsay-Strathmore Irrigation District (I75r-1514-LTR1); Lower Tule
25 River Irrigation District (I75r-2771-LTR1); Madera, County of
26 (14-06-200-2406A-LTR1); Madera Irrigation District - Friant
Division (I75r-2891-LTR1); Orange Cove, City of
(14-06-200-5230-LTR1); Orange Cove Irrigation District
(I75r-1672-LTR1); Porterville Irrigation District (I75r-4309-LTR1);
Saucelito Irrigation District (I75r-2604-LTR1); Shafter-Wasco
Irrigation District (14-06-200-4032-LTR1); Southern San Joaquin
Municipal Utility District (I1r-1460-LTR1); Stone Corral Irrigation
District (I75r-2555-LTR1); Tea Pot Dome Water District
(14-06-200-7430-LTR1); Terra Bella Irrigation District
(I75r-2446-LTR1); and Tulare Irrigation District (I75r-2485-LTR1).
These contracts can be found in the Bureau's Water Contracts
administrative record. See USBR WC AR: 000773, 000172, 025149,
019329, 002192, 025212, 025279, 025341, 002672, 002841, 002974,
003156, 025466, 025587, 004084, 025850, 025913, 025977, 026041,
026106, 026167, 026231, 026297, 026357. Pls.' Brief. at 7.

1 citing FWS AR 0617394.⁵ FWS issued its biological opinion
2 ("BiOp") on these contracts on January 19, 2001 and NMFS issued
3 its biological opinion on the following morning, January 20,
4 2001. In a letter dated October 30, 2000, the Bureau requested
5 that NMFS concur in a Section 7 determination that the Friant
6 contracts were not likely to adversely affect listed species.
7 NMFS refused to do so, forcing the Bureau to request formal
8 consultation for the long-term renewal of the Central Valley
9 Project water service contracts on January 5, 2001. Pls.' SUF
10 7, citing NMFS AR 000526. As of January 5, 2001, the Bureau had
11 not provided a final biological assessment on the Friant
12 contracts. The Bureau provided the biological assessment on
13 January 17, 2001. Pls.' SUF 9, citing FWS AR 0823519.

14 On January 19, 2001, the same day that the FWS BiOp was
15 issued, FWS senior biologist Dr. David Wright e-mailed Michael
16 Fris, another employee at FWS, discussing "possible holes and
17 weaknesses in our crash BO," Pls.' SUF at 11, citing FWS AR
18 01802983, 018023984, including inadequate time to do a
19 consultation, inadequate biological assessments, a track record
20 of lack of compliance by the Bureau of Reclamation, concern that
21 the contracts are inconsistent with CVPIA, and lack of

22
23 ⁵ The adjudication of this matter has been made substantially
24 more difficult by the parties' failure to use the same Bates
25 numbers system in their statements of undisputed facts. Plaintiffs
26 and Federal Defendants use the numbers assigned to the documents
by FWS and/or NMFS, while the Friant defendants use the numbers
assigned by the Bureau. Thus, it is possible that the same
documents will be cited differently, depending on how the parties
have cited the document in their SUFs.

1 coordination with NMFS. Id. Dr. Wright's supervisor, Michael
2 Thabault, forwarded Dr. Wright's memorandum up the chain of
3 command to Wayne White "in the interest of the deliberative
4 process," and so that he could "be aware of the vulnerabilities
5 before signing" [the biological opinion]. Pls.' SUF 11, citing
6 FWS AR 0823985. That same day, on January 19, 2001, Dr. Wright
7 again wrote his colleague, Michael Fris, and asked him to "slam
8 out the Conclusion section" while he was "polishing Effects."
9 Pls.' SUF 12, citing FWS AR 0823988.

10 **2. ESA Consultation on the Hidden and Buchanan Districts**

11 Two of the Friant districts have additional contracts with
12 the Bureau for delivery of water from CVP units. Pls.' SUF 13.
13 The contracts are referred to as Chowchilla Water District,
14 Buchanan Unit (Contract # 14-06-200-3844A-LTR1) and the Madera
15 Irrigation District, Hidden Unit (Contract # 14-06-200-4020A-
16 LTR1). Id. The Hidden Unit contract provides for delivery of
17 24,000 acre-feet of water annually from Hensley Lake to Madera
18 Irrigation District, and the Buchanan Unit contract provides for
19 delivery of 24,000 acre-feet annually from Eastman Lake to
20 Chowchilla Water District. Friant Defs.' SUF 49, citing BORESA
21 041538. The renewal contracts concerning Hidden and Buchanan
22 reservoirs were executed on February 14 and 15, 2001.

23 **a. NMFS's Consultation**

24 The January 5, 2001 formal consultation request to NMFS on
25 the Friant contracts had not encompassed the Hidden and Buchanan
26 contracts. Pls.' SUF 22, citing NMFS AR 000526. Nevertheless,

1 on February 12, 2001, NMFS issued a letter in response to the
2 Bureau's request, that NMFS did, in fact, "consider the effects
3 of the Hidden and Buchanan contracts in the Biological Opinion
4 issued to the Bureau on January 20, 2001." Pls.' SUF 19, citing
5 NMS AR 0008881, et seq., NMFS AR 000915, Pls.' SUF 50, NMFS AR
6 000884, 000885, 000913, 000915. The Bureau did not request
7 formal Section 7 consultation from NMFS on the Hidden and
8 Buchanan contracts. Pls.' SUF 52, citing NMFS AR 000526-27,
9 000885, 000881. No biological opinion was ever issued by NMFS
10 on the Buchanan and Hidden units. Id.

11 **b. FWS's Consultation**

12 An internal FWS memorandum noted that a FWS biologist
13 "decided on 1-19-01 to not include Hidden and Buchanan Unit
14 Contracts in the Friant-Cross Valley Opinion due to insufficient
15 time to make the necessary changes in the project description
16 and effects." Pls.' SUF 14, citing FWS AR 09024885-86. After
17 issuance of the FWS 2001 BiOp and NMFS 2001 BiOp, the Bureau
18 notified FWS and NMFS that it had discovered an "administrative
19 oversight" in which the tables provided to the Services as part
20 of the project description for the consultation did not include
21 the Hidden and Buchanan contracts. BORESA 045889, 041752.

22 On February 1, 2001, the Bureau formally requested
23 consultation with FWS on the Hidden and Buchanan contracts.
24 Pls.' SUF 19, citing FWS AR 09024891. On February 14, 2001, FWS
25 issued a new biological opinion for the Hidden and Buchanan
26 contracts. Pls.' SUF 16. In an e-mail dated February 2, 2001

1 FWS employee, Michael Fris, wrote that "I don't think this is a
2 big deal, because I think this opinion is pretty much written up
3 thanks to the Friant opinion." Pls.' SUF 17, citing FWS AR
4 09025034.

5 **3. FWS's and NMFS's 2001 Biological Opinions**

6 **a. The Services' "Adverse Modification" Analysis**

7 **i. NMFS**

8 The entire discussion of the effects and cumulative effects
9 of the long-term Friant contracts in NMFS' January 20, 2001
10 biological opinion spans three pages. In these pages, NMFS
11 acknowledged the potential impact of Friant diversions on
12 downstream fish, including the endangered Sacramento River
13 winter-run Chinook salmon.

14 The parties dispute whether NMFS' 2001 biological opinion
15 on the Friant contracts adequately addressed the recovery of
16 winter-run Chinook salmon. Pls.' SUF 21, citing NMFS AR 900-02,
17 Fed. Defs.' Response SUF 25, citing BORESA 041554-55, 029201-03.
18 When the Bureau first attempted to renew the Friant contracts in
19 1991, it asked NMFS to concur that the contracts were not likely
20 to adversely affect winter-run Chinook salmon. Pls.' SUF 27,
21 citing NRDC v. Houston, 146 F.3d 1118, 1123-4, 1126 (9th Cir.
22 1998). By the time the Bureau initiated consultation on the
23 present Friant contracts, NMFS had listed two new threatened
24 species that inhabit the Delta, Central Valley Steelhead and
25 Central Valley spring-run Chinook salmon. Pls.' SUF 30, citing
26 NMFS AR 000892. Although NMFS had begun consultations with the

1 Bureau on CVP's effects on spring-run Chinook salmon and
2 steelhead, those consultations had not been completed as of
3 January 20, 2001. Pl.'s SUF 31, citing NMFS AR 00084.⁶

4 **ii. FWS**

5 At the time FWS issued its January 19, 2001 biological
6 opinion, FWS had designated critical habitat for at least seven
7 species considered in the 2001 consultation, the California
8 condor, Delta smelt, Fresno kangaroo rat, least Bell's vireo,
9 Little Kern golden trout, Southwestern willow flycatcher, and
10 the Valley elderberry longhorn beetle. Pls.' SUF 24, citing FWS
11 BiOp at 1-8 to -7, 3-23; BORESA 039978-80. FWS's January 19,
12 2001 biological opinion mentioned "recovery" in connection with
13 its effects analysis for the Delta Smelt, least Bell's vireo,
14 and the Southwestern willow fig catcher. Pls.' SUF 25. The
15 parties dispute whether the FWS's 2001 BiOp drew a conclusion as
16 to whether the Friant contracts, taken together with cumulative
17 effects, would result in adverse modification of the critical
18 habitat of the least Bell's vireo. Pls.' SUF 26, citing FWS
19 BiOp at 3-23 to -24, FWS BiOp at 1-7, 5-7; BORESA 040068-69;
20 BORESA AR 039980, 040128.

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24 ⁶ NMFS's 2001 BiOp explains that there is an ongoing
25 consultation to update the NMFS 1993 opinion on the CVP/State Water
26 Project, which is anticipated to be completed prior to March 1,
2001. NMFS AR 00084.

1 **B. THE SERVICES' JEOPARDY ANALYSES**

2 **1. NMFS**

3 NMFS's Biological Opinion concluded that "the renewal CVP
4 long-term water service and repayment contracts for the twenty-
5 eight Friant Division water contractors and the eight (8) Cross
6 Valley water contractors for a period of 25 years is not likely
7 to jeopardize the continued existence of winter-run Chinook
8 salmon, spring-run Chinook salmon, or Central Valley steelhead,
9 or result in the destruction or adverse modification of
10 designated critical habitat for these species." Friant Defs.'
11 SUF 29, citing BORESA 041555.

12 **2. FWS**

13 On January 18, 2001, a meeting occurred between FWS
14 biologists and their field supervisor, Wayne White, among
15 others, where they discussed "status and some outstanding issues
16 relevant to the Friant/Cross Valley long-term contract
17 renewals." Pls.' SUF 34, citing FWS AR 08023904. Dr. David
18 Wright, the field supervisor of the Sacramento FWS office,
19 advised Mr. White, who was in charge of FWS' California and
20 Nevada offices, that this "long-term contract renewal . . .
21 would be a jeopardy on indirect effects." Mr. White rejected
22 Dr. Wright's analysis, however, because consideration of such
23 effects "would be a hard sell outside California." Another FWS
24 biologist, Joy Winckel, asked Mr. White whether they could even
25 consider jeopardy at all. Mr. White stated that it was "too
26 late" to consider jeopardy. The opinion had to be rushed out

1 the following day, Mr. White explained, to avoid the opinion
2 becoming even weaker under the incoming Bush administration."
3 Pls.' SUF 35, citing FWS AR 08023904.

4 In order "[t]o reach a no jeopardy conclusion," FWS's
5 January 19, 2001 BiOp on the Friant contracts excluded certain
6 actions which "will require separate determinations regarding
7 their potential effects on threatened and endangered species and
8 critical habitat pursuant to section 7 and/or section 10 of the
9 ESA." Pls.' SUF 36, citing FWS 080240263.⁷ FWS had been
10 concerned with operations and maintenance activities associated
11 with contract deliveries.⁸ During the 1991 consultation on the
12 now invalidated Friant long-term renewal contracts, for example,
13 as well as during subsequent consultations on the interim
14 contracts adopted after NRDC v. Houston, FWS's biological
15 opinion required the Bureau to commit to preparing guidance on
16 how to conduct operations and maintenance activities so as to
17 minimize endangered species impacts. The Bureau, however, was
18 "behind the date identified in the Interim opinion" in
19 implementing the operation and maintenance plan. Upon

20
21 ⁷ FWS's BiOp explains that these related actions include but
22 may not be limited to operations and maintenance activities, water
23 transfers, assignments, and exchanges by Friant and Cross-Valley
24 contractors, including flood flows, and Warren Act contracts for
25 conveyance of non-federal water using federal facilities. FWS BiOp
26 41, FWS AR 08024103.

24 ⁸ A January 2, 2001 internal FWS memorandum describes two
25 unauthorized riverbed recontouring jobs by the Lower Tule River
26 Irrigation District, in 1999 and 2000, that destroyed at least
several hundred elderberry bushes. Pls.' SUF 37, citing FWS AR
08023055.

1 completion of consultation on the contracts at issue here, FWS
2 again required the Bureau to commit to completing site-specific
3 operations and management plans within one year of the January
4 19, 2001 biological opinion. Pls.' SUF 37, citing FWS BiOp 2-
5 38, BORESA 040026.

6 FWS's January 19, 2001 BiOp recognizes that operations and
7 maintenance activities on Bureau facilities used to deliver
8 Bureau water to the Friant contracts are related to the Friant
9 contracts. Operations and maintenance activities were
10 identified as "requiring section 7 consultation separate from
11 the present opinion." FWS's opinion advised the Bureau to
12 "consider whether it may have a duty to avoid irreversible or
13 irretrievable commitments pending any biological opinion on that
14 'related action.'" Pls.' SUF 39, citing FWS BiOp at 4-1, BORESA
15 040104. The FWS biologists who conducted the Friant contract
16 consultation understood that they were not analyzing indirect
17 effects of the Friant contracts, from interrelated operations
18 and maintenance activities. Pls.' SUF 40, citing FWS AR
19 08023512.⁹

20 The Friant long-term contracts cumulatively authorized the
21 Bureau to deliver more than 2.1 million acre-feet of water per
22 year, for twenty-five years. Pls.' SUF 41, citing FWS BiOp 2-3,
23 ////

24
25 ⁹ Plaintiffs cite an internal FWS memorandum where a FWS
26 biologist expressed concern that addressing operations and
maintenance in a separate opinion would limit BOR's ability to
condition the contracts (e-mail from David Wright to Joy Winckel).

1 2-5 to-6 (Table 1.4), USBR ESA AR 039991, 039993-4.¹⁰

2 The parties dispute the exact amount of water that the BiOps on
3 the Friant contracts actually considered in the consultation.
4 FWS opined that "delivery of full contract quantities is
5 unrealistic and that deliveries will continue to be impacted by
6 existing climate, hydrology, actions and statutes including, but
7 not limited to existing biological opinions, existing
8 implementation of the CVPIA, and conformance and adherence to
9 additional existing State and Federal regulations and
10 guidelines; and socioeconomic factors." Friant Defs.' SUF 13,
11 FWS January 19, 2001 BiOp, BORESA 040104-040105. FWS conducted
12 its analysis under the expectation that water will be delivered
13 to CVP service contractors in quantities that approximate
14 historic deliveries (1988 through 1997) as given in Appendix D
15 of the November 21, 2000 programmatic long-term CVP contracts
16 consultation. Id.

17 FWS understood when preparing its biological opinion that
18 its assumptions regarding water deliveries were "needed to . . .
19 enable use [sic] to get No Jeopardy." Pls.' SUF 45, citing FWS
20 AR 08023997 (e-mail from Michael Hoover to David Wright). In
21 reaching its "no jeopardy" and "no adverse modification"
22 conclusions, FWS relied on the Bureau's stated commitment, as
23 set forth in the project description of the FWS's biological
24

25 ¹⁰ "Full entitlements are 2,115,975 acre-feet for the Friant
26 division and 128,300 acre-feet for the Cross Valley Division."
BORESA 039991, FWS BiOp 2-3.

1 opinion, to carry out an extensive, thirty-three page list of
 2 measures that would mitigate the adverse direct and indirect
 3 effects of the Friant contracts. FWS "assumed" that the Bureau
 4 would fully and timely carry out these mitigation measures, as a
 5 predicate to FWS's "no jeopardy" finding. Pls.' SUF 46, citing
 6 FWS BiOp at 2-22 to 2-55, 4-1; BORESA 040010-040043, 040104.

7 While some progress was made by the Bureau on various
 8 commitments to keeping mitigation promises, the Bureau was still
 9 in the process of meeting its obligations. Pls.' SUF 48,
 10 citing, e.g., BORESA 040017.

11 **D. OTHER BIOLOGICAL OPINIONS**

12 **1. November 2000 NMFS and FWS Biological Opinions**

13 **a. NMFS**

14 In November 2000, NMFS prepared a document relating to both
 15 the CVPIA (Central Valley Project Improvement Act) and the CVP
 16 (Central Valley Project), entitled "Programmatic Biological
 17 Opinion for the Improvement Act Preferred Alternative and
 18 Proposed Record of Decision" ("NMFS Programmatic BO"). The NMFS
 19 CVPIA BiOp declared that the CVPIA FPEIS is "a tiered National
 20 Environmental Policy Act document that allows for future site-
 21 specific NEPA analysis on CVPIA actions," and that "[t]his
 22 biological opinion is similarly tiered."¹¹ Friant Defs.' SUF 7,

23 ¹¹ The FWS Opinion states:

24 This consultation is intended to address, in a
 25 comprehensive manner, the numerous and widely varied
 26 actions related to implementation of the CVPIA and the
 continued operation and maintenance of the CVP that may

1 citing BORESA 29833. The parties dispute whether the FWS and
2 NMFS 2001 BiOps on the Friant Long-Term Contracts were preceded
3 by and "tiered" from eight previous biological opinions. NMFS's
4 programmatic BiOp evaluated the Delta Division operations of the
5 CVP, discussing the Tracey Pumping plant.

6 **b. FWS**

7 In November 2000, FWS prepared a "Biological Opinion" on
8 the Implementation of the CVPIA and Continued Operation of the
9 Maintenance of the CVP. This opinion is colloquially known as
10 the "Mother Opinion." Friant Defs.' SUF 1, citing BORESA
11 052972-052977. The FWS Mother Opinion explains that "Site
12 specific or tiered consultations following this programmatic
13 consultation will rely on programmatic assumptions made during
14 this consultation process while development and implementation
15 of site specific actions will rely on the direction provided by
16 both consultation processes." Friant Defs.' SUF 4, citing
17 BORESA 052934-052935. Included among the proposed actions upon
18 which the consultation occurred was the "Long-Term Renewal of

19 ////

20
21 be undertaken by the service and/or Reclamation. While
22 a number of the actions are clearly interrelated and
23 interdependent, others are not and could be considered
24 as stand alone actions . . . the Service and Reclamation
25 have agreed that activities listed in the Project
Description would be evaluated as a suite of actions all
related in one form or another to the CVP and/or CVPIA.
Therefore, this biological opinion addresses the effects
upon listed species resulting from implementation of
this suite of actions as a whole.

26 Friant Defs.' SUF 3.

1 CVP Water Service Contracts."¹² Identified among contracts to be
2 renewed were the Friant Division contracts. Friant Defs.' SUF
3 5, citing BORESA 052972-052976.

4 The FWS Mother Opinion includes discussion of operations
5 and maintenance activities, commitments made by the Bureau
6 regarding operations and maintenance planning, and the direct
7 and indirect effects of operations and maintenance activities of
8 the CVP. Friant Defs.' SUF 32, citing BORESA 052989-052992,
9 053002-053003, 053053.¹³ The Mother Opinion asserts that it
10 considered the "direct and indirect effects of agricultural
11 conversions and related operations" and the "direct and indirect
12 effects of municipal and industrial conversions" facilitated by
13 the CVP. Friant Defs.' SUF 19, citing BORESA 053048-053051.
14 FWS rendered non-jeopardy opinions regarding continued CVP
15 operations, but specifically stated that those opinions were
16 based upon "implementation of and compliance with all of the
17 conservation measures and commitments," and "commitments to
18 uphold ESA by both agencies, combined with implementation . . .
19 of programs" Friant Defs.' SUF 20, citing BORESA
20 053068, 039988.

21
22 ¹² The Mother Opinion, however, explained that after the
23 negotiations on the renewal were completed, "the renewals will be
24 subject to a separate, tiered analysis that is consistent the NEPA
25 tiering in the PEIS The site specific, tiered analysis
26 will address direct and indirect effects of contract renewal."
BORESA 052972.

25 ¹³ Plaintiffs point out that Appendix K from the Mother
26 Opinion defines activities that require further site-specific
consultation. BORESA 053423-24.

1 the administrative record lodged with this court, and after oral
2 argument.

3 **A. STANDARD OF REVIEW**

4 This court is charged with reviewing agency actions under
5 the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A),
6 and must be satisfied that the decisions are not "arbitrary,
7 capricious, an abuse of discretion, or otherwise not in
8 accordance with law." Nev. Land Action Ass'n v. United States
9 Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993); 5 U.S.C. §
10 706(a)(2). The court's review is "narrow" but "searching and
11 careful," Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378
12 (1971). Review of the issues subject to the arbitrary and
13 capricious standard examine whether the agencies' decisions are
14 based on a consideration of the relevant factors and whether the
15 agencies articulated a rational connection between the facts
16 found and the decisions made. Id. at 526.

17 **B. LEGAL FRAMEWORK**

18 For any federal action that may affect a threatened or
19 endangered species or its habitat, the agency contemplating the
20 action, otherwise known as "the action agency " (here, the
21 Bureau of Reclamation), must consult with the appropriate
22 "consulting agency" (here, the FWS and NMFS), for the purpose of
23 ensuring that the federal action is not likely to: (1)
24 jeopardize "the continued existence of" an endangered or

25 _____
26 Bureau had violated the ESA and upheld this court's rescission
order. NRDC v. Houston, 146 F.3d 1118, 1129 (9th Cir. 1998).

1 threatened species; and (2) that the federal action will not
2 result in the "destruction or adverse modification" of the
3 designated critical habitat of the listed species. 16 U.S.C.
4 § 1536(a)(2).¹⁷

5 Typically, the action agency makes a written request to the
6 consulting agency, 50 C.F.R. § 402.14(c), and after formal
7 consultation, the process concludes with the consulting agency
8 issuing a biological opinion. The BiOp must address both the
9 jeopardy and critical habitat prongs of Section 7 by considering
10 the current status of the species, the environmental baseline,
11 the effects of the proposed action, and the cumulative effects
12 of the proposed action. 50 C.F.R. § 402.14(g)(2)-(3). See
13 generally Gifford Pinchot Task Force v. United States Fish &
14 Wildlife Serv., 378 F.3d 1059, 1063-65 (9th Cir. 2004).

15 Regardless of whether critical habitat is designated, an agency
16 must consult with the Secretary where an action will "jeopardize
17 the continued existence" of a species. If critical habitat has
18 been designated, ESA imposes an additional consultation
19 requirement where an action will result in the "destruction or
20 adverse modification" of critical habitat. 16 U.S.C. § 1536(a).
21 If the BiOp concludes that the proposed action is likely to
22 jeopardize a protected species, the agency must modify its
23 proposal according to the service's suggestions or risk being
24 found in violation of the statute. 16 U.S.C. § 1536(b)(3)(a);

25 ¹⁷ These consultations are often referred to as "Section 7
26 consultations."

1 Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1193 (9th Cir.
 2 1988). Section 7(d) of ESA forbids the "irreversible or
 3 irretrievable commitment of resources" during the consultation
 4 process.

5 Plaintiffs challenge the three BiOps under both the
 6 jeopardy and critical habitat prongs of Section 7. Below, I
 7 address the consulting agencies' analyses of the critical
 8 habitat requirement on the Friant units, and then examine their
 9 treatment of the jeopardy requirement.¹⁸ This order will then
 10 address the agencies' consultation on the Buchanan and Hidden
 11 water units.

12 **C. THE SERVICES' "ADVERSE MODIFICATION OF CRITICAL HABITAT"**
 13 **ANALYSES**

14 An ESA biological opinion must determine whether the
 15 federal action will result in the "destruction or adverse
 16 modification" of the designated "critical habitat" of the listed
 17 species. 16 U.S.C. § 1536(a)(2). Plaintiffs argue that NMFS
 18 and FWS failed to properly consider and analyze whether the
 19 renewal of the contracts was likely to result in adverse
 20 modification of critical habitat for the winter-run Chinook
 21 salmon and for other listed species with critical habitat.

22 ////

23
 24 ¹⁸ The court has examined the February 14, 2001 Hidden and
 25 Buchanan FWS biological opinion, and agrees with plaintiffs that
 26 they are "materially the same as the FWS' January 19, 2001"
 biological opinion (on the Friant units), Pls.' Br. at 12. See
 BORESA 053428, et seq. Thus, the analysis of the January 19, 2001
 BiOp also applies to the February 14, 2001 BiOp.

1 Before addressing that contention, I discuss a threshold issue,
2 the agencies' interpretation of "adverse modification" pursuant
3 to 50 C.F.R. § 402.02.

4 **1. The Services' Definition of "Destruction or Adverse**
5 **Modification" under 50 C.F.R. § 402.02 and Gifford**
6 **Pinchot**

7 It is undisputed that at the time FWS and NMFS issued their
8 biological opinions in 2001, they applied a definition of
9 "destruction or adverse modification" of critical habitat that
10 the Ninth Circuit has recently held to be invalid.¹⁹ Gifford
11 Pinchot Task Force v. United States Fish & Wildlife Serv., 378
12 F.3d 1059, 1069 (9th Cir. 2004). The regulatory definition
13 "requires appreciable diminishment of the critical habitat
14 necessary for survival before the 'destruction or adverse
15 modification' standard could ever be met." Id. Put
16 differently, under the regulation "a proposed action 'adversely
17 modifies' critical habitat if, and only if, the value of
18 critical habitat for *survival* is appreciably diminished." Id.
19 That understanding, the Circuit held, "reads the 'recovery' goal
20 out of the adverse modification inquiry" and "cannot be right"
21 because the Services would be "obligated to be indifferent to,
22 if not to ignore, the recovery goal of critical habitat." Id.

23 ¹⁹ The Services' regulation defined "destruction or adverse
24 modification" as "a direct or indirect alteration that appreciably
25 diminishes the value of critical habitat for both the survival and
26 recovery of a listed species. Such alterations include, but are
not limited to, alterations adversely modifying any of those
physical or biological features that were the basis for determining
the habitat to be critical. 50 C.F.R. § 402.02.

1 at 1070 (citing N.M. Cattle Growers Ass'n v. United States Fish
2 and Wildlife Serv., 248 F.3d 1277, 1289 & n.2 (10th Cir. 2001)
3 and Sierra Club v. United States Fish and Wildlife Serv., 245
4 F.3d 434, 441-42 (5th Cir. 2001)). Such a reading, the court
5 held, "contradicts Congress's express command" and constitutes
6 "a failure of the regulation to implement Congressional will."
7 Id. at 1069-70.²⁰ In sum, the Circuit held that the Services
8 must consider both species' survival and recovery in considering
9 whether the proposed action adversely modifies critical habitat.
10 Id. at 1070.

11 The Circuit also explained that when analyzing the BiOps'
12 critical habitat analysis, courts "must presume, unless rebutted
13 by evidence in the record, that the [Services] followed [their]
14 definition of adverse modification and thereby ignored the
15 evaluation of whether adequate critical habitat would remain to
16 ensure species recovery." Id. at 1070. The Government could
17 also show "harmless error" by proving that, even if it ignored
18 recovery on the record by following its regulation, it did not
19 affect the result of the critical habitat analysis.²¹

20 ²⁰ The Ninth Circuit elaborated that such a reading would
21 allow the Services to authorize the "complete elimination of
22 critical habitat necessary only for recovery, and so long as the
23 smaller amount of critical habitat necessary for survival is not
appreciably diminished, then "no destruction or adverse
modification" has taken place. 978 F.3d at 1070.

24 ²¹ Nonetheless, the Circuit concluded that such an argument
25 is disfavored because the Services (and in this case, the court)
26 would be required to craft a hypothetical critical habitat analysis
that takes into account species recovery in order to compare
process and outcome to the non-recovery analysis in the BiOps. Id.

1 Plaintiffs assert that the Services' failed to consider
2 whether the contracts were likely to result in adverse effects
3 on critical habitat for winter-run Chinook, and other listed
4 species with designated critical habitat. Defendants contend
5 that they did, in fact, consider both recovery and survival in
6 their biological opinions. Under Gifford Pinchot, this court
7 must presume that the Services followed their now-invalid
8 regulation and examine whether defendants can bear the burden of
9 showing that the record rebuts such a presumption for each of
10 the listed species. Put differently, but to the same effect,
11 the question is whether defendants can demonstrate that the
12 record supports a conclusion that NMFS analyzed species recovery
13 or conservation in the context of critical habitat and ignored
14 their own regulation. Gifford Pinchot, 378 F.3d at 1075.

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17 _____
18 at 1072, n. 8 (citing Citizens to Preserve Overton Park v. Volpe,
19 401 U.S. 402 (1971)). Thankfully, the court need not address this
issue because neither Federal nor Friant defendants have made such
an argument.

20 In Gifford Pinchot, defendants argued that they implicitly
21 considered recovery in their critical habitat analysis, thus
ignoring their own regulation. Thus, as the Ninth Circuit
22 explained, Federal defendants did not argue that they relied on the
regulation and that the reliance was harmless. Instead, the
23 agencies asserted a much more nuanced point, that consideration of
recovery was implicit in their critical habitat analysis, and that
24 FWS met the ESA standards. Based on their papers and oral
argument, it appears to the court that in the instant case Federal
25 defendants assert a similar position, i.e., that they implicitly
considered recovery and survival in their biological opinions, and
26 that however this court interprets the adverse modification
regulatory definition, the Services met the appropriate standard.

1 **2. Winter-run Chinook Salmon (Plaintiffs' Sixth Claim)**

2 Friant defendants maintain that Gifford Pinchot does not
3 apply because NMFS has withdrawn its critical habitat
4 designation for winter-run Chinook and because the Friant
5 contracts do not adversely modify critical habitat of winter-run
6 Chinook. The administrative record does not support the
7 argument.

8 NMFS first designated critical habitat for winter-run
9 Chinook in 1993, 58 Fed. Reg. 33212 (June 16, 1993), and that
10 designation remains valid. As plaintiffs note, a BiOp issued by
11 NMFS on October 22, 2004 confirms that critical habitat was, and
12 remains, designated for winter-run Chinook salmon. See, e.g.,
13 Request for Judicial Notice in Supp. of Opp. of Def.-Ints.
14 SLDMWA and Tehama-Colusa Canal Authority to Mot. by NRDC, et al.
15 for Summ. Adj. (Nov. 19, 2004), Ex. B at 48 (describing current
16 critical habitat designation for winter-run Chinook).²² Friant
17 defendants assert that NMFS vacated its designation by consent
18 decree, citing Ass'n of California Water Agencies v. Evans, 386
19 F.3d 879, 881 (9th Cir. 2004) and Nat'l Ass'n of Home Builders
20 v. Evans, 2002 WL 1205743 (D.D.C. 2002). Both of these cases
21 challenged 65 Fed. Reg. 7764 (Feb. 16, 2000), which designated
22 critical habitat for nineteen listed populations of steelhead

23 ////

24
25 ²² NMFS's website also states that the critical habitat
26 designated for winter-run chinook salmon remains valid. See
<http://www.swr.nmfs.noaa.gov> (viewed on April 3, 2005).

1 trout and salmon, not including the winter-run Chinook.²³

2 Alternatively, Friant defendants argue that the renewal of
3 the contracts has no effect on the critical habitat of the
4 winter-run Chinook. They inappropriately extract one sentence
5 from the "effects" discussion in NMFS' 2001 BiOp which states
6 that "[s]ince winter-run chinook and spring-run chinook are not
7 present in the San Joaquin River system, they will not be
8 affected by these circumstances." "[T]hese circumstances" refer
9 to the direct effects of Friant Dam's diversion on the winter-
10 run chinook. BORESA 041554. Friant defendants contend that
11 it is "speculation that [winter-run] chinook might return to the
12 upper San Joaquin River to spawn at some future date, so that
13 the continuation of present water diversions might 'adversely
14 affect' their potential future habitat." Friant Def.'s Br. at
15 13, n. 7. I cannot agree.

16 While it is true that NMFS' 2001 BiOp observes that winter-
17 run chinook salmon "no longer occur within the San Joaquin
18 Basin," the 2001 BiOp also states that "[v]iable populations of
19 these listed species currently spawn and rear in accessible
20 river reaches." Further, "[d]esignated critical habitat" for
21 winter-run chinook includes "all river reaches and estuarine

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24
25 ²³ The nineteen salmon and steelhead species at issue
26 included the California Central Valley spring-run chinook and the
California coastal chinook, but did not include the winter-run
chinook. See Fed. Reg. 7764.

1 areas of the Sacramento-San Joaquin Delta."²⁴ BORESA 041550.
2 According to the 2001 BiOp, "[t]he essential elements of
3 designated critical habitat [for winter-run chinook] are the
4 water, substrate, and adjacent riparian areas." Id.

5 Friant defendants' argument that the contracts do not
6 adversely modify the critical habitat of winter-run chinook must
7 be rejected because the Services are required to analyze
8 indirect effects caused or induced by the action that are
9 "reasonably certain to occur," in addition to the direct
10 effects. 50 C.F.R. § 402.02. As plaintiffs note, NMFS
11 concluded that there would be "[p]otential indirect effects of
12 the proposed contract renewals" on the critical habitat of
13 winter-run chinook, including changes in surface water storage,
14 changes in stream flows in the lower San Joaquin River, and
15 changes in flows through the Delta and/or other CVP facilities."
16 Id. NMFS explained that "[f]low changes within the Delta . . .
17 may also exacerbate the conditions that entrain [winter-run]
18 juveniles . . . into the southern Delta and the pumping plants
19 of the CVP and State Water Project." Id. Contrary to Friant
20 defendants' assertions, NMFS's analysis in the 2001 BiOp
21 concluded that winter-run chinook would be impacted through

22 ////

23 ////

24
25 ²⁴ Thus, NMFS's analysis directly contradicts' Friant
26 defendants' assertion that "critical habitat for winter-run salmon
was only designated on the Sacramento River." Friant Defs.' Br.
at 16.

1 indirect effects of the proposed action.²⁵ Federal defendants
2 were, as they recognize, Fed. Defs.' Br. at 12, required to
3 assess the impact of the contract renewal on habitat critical to
4 recovery of the winter-run chinook salmon.

5 Both Friant and Federal defendants assert that the agency
6 did, in fact, ignore the now-invalidated regulations and
7 adequately considered recovery of winter-run chinook salmon in
8 the context of their critical habitat. Friant Defs.' Br. at 13-
9 14; Fed Defs.' Br. at 17-18. I cannot agree.

10 Federal defendants assert that this court must consider
11 other documents besides the NMFS's 2001 BiOp because the BiOp
12 was "tiered off" these documents, "resulting in a thorough
13 biological review" Fed. Defs.' Br. at 6, 12. Federal
14 defendants assert that NMFS considered long-term renewal of the
15 CVP water service contracts in its November 14, 2000
16 Programmatic BiOp,²⁶ and that this, along with the passages cited

17
18 ²⁵ This court has also previously recognized that indirect
19 effects, including "[t]he pumping and reverse flows associated with
20 [water exports of Delta water through the Delta-Mendota Canal], may
affect [winter-run] species outside the Friant service area." See
May 31, 1995 Order at 19.

21 ²⁶ In 1992, Congress enacted the Central Valley Project
22 Improvement Act ("the Act") as Title XXXIV of the Reclamation
23 Projects Authorization and Adjustment Act of 1992, Pub.L. No.
24 102-575, 106 Stat. 4600, 4706-31 (1992); the law took effect on
25 October 31 of the same year. CVPIA seeks to achieve "a reasonable
26 balance among competing demands for use of Central Valley Project
water, including the requirements of fish and wildlife,
agricultural, municipal and industrial and power contractors."
Section 3402(f). Section 3406(b)(2) of the CVPIA directs the
Secretary to dedicate and manage annually eight hundred thousand
acre-feet of Central Valley Project yield for the primary purpose
of implementing the fish, wildlife and habitat restoration purposes

1 from the 2001 BiOp show that federal defendants "properly took
2 recovery into account." Fed. Defs.' Br. at 14.

3 In Gifford Pinchot, the Ninth Circuit, for the first time,
4 approved of "tiering," or "programmatic environmental analysis
5 supplemented by later project-specific environmental analysis"
6 in the ESA context. 378 F.3d at 1067-68, citing Salmon River
7 Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir.
8 1994) (approving of tiering in the NEPA context). It held that
9 the defendants there could tier to the National Forest Plan
10 because it was a "unique land-management plan" that had already
11 been approved by this court" and that it was "hesitant to fault
12 the agency for relying on it in the context of this case." Id.
13 Arguably, the Ninth Circuit took the unusual step of approving
14 tiered ESA analysis in Gifford Pinchot because the Forest Plan
15 which served as the programmatic opinion was not ordinary, but a
16 particularly thorough and complex one which survived a legal
17 challenge. Id. at 1067-68. If so, the holding was a narrow
18 one, not applicable to all ESA cases.²⁷ Because this court is

19 and measures authorized by this title; to assist the State of
20 California in its efforts to protect the waters of the San
21 Francisco Bay/Sacramento-San Joaquin Delta Estuary; and to help
22 meet such obligations as may be legally imposed upon the Central
23 Valley Project under State or Federal law following the date of
24 enactment of this title, including but not limited to additional
obligations under the Federal Endangered Species Act. Under the
CVPIA, defendants were charged with issuing BiOps and EIS
statements which comply with ESA and NEPA.

25 ²⁷ This court is bound by the Ninth Circuit's holding, but
26 must confess to reservations about extending "tiered analysis" to
ESA. Tiered consultation, while discussed in the implementing
regulations of NEPA, is not described anywhere in ESA or its

1 uncertain about the scope of Gifford Pinchot, and discretion
2 being the better part of valor, the court will proceed to
3 consider whether tiering aids defendants in the matter at bar.

4 Defendants urge the court to look at other documents and
5 BiOps, which they argue, shows that they fulfilled their ESA
6 obligations. Both Friant and Federal defendants cite to the
7 agencies' 2000 programmatic BiOp on CVPIA to argue that the 2000

8
9 implementing regulations. Allowing such a process in a procedural
10 statute which requires no particular result makes staged analysis
11 acceptable. ESA, however, is an action-forcing statute, turning
12 on identified prohibited consequences of government action, both
13 direct, indirect, and interrelated effects. Tiering, however,
14 i.e., staged analysis, will tend to obscure the ability of the
15 agency to identify the direct and indirect consequences of
16 particular action, and thus tend to obscure when government action
17 is prohibited. Moreover, it is established that segmented analysis
18 is prohibited in an ESA context. Connor v. Burford, 848 F.2d 1441,
19 1453-54 (9th Cir. 1988) (holding that FWS was required to consider
20 consequences of all stages of oil and gas activity in rendering a
21 biological opinion). The difficulty in distinguishing between
22 prohibited segmentation, and permitted tiering, was illustrated
23 during oral argument relative to the motion at bar.

24 Unfortunately, the Gifford Pinchot court failed to explain how
25 a "tiered analysis" will be applied in an ESA case, and many
26 questions are unanswered. The court notes that only two other
cases have ever discussed a "tiered" analysis in the ESA context,
Buckeye Forest Council v. United States Forest Serv., 337 F.Supp.2d
1030, 1036 (S.D. Ohio 2004) (concluding that it is not clear that
tiered consultation fulfills defendants' ESA obligations) and
Pacific Coast Fed'n of Fishermen's Ass'n's v. Nat'l Marine
Fisheries, No. 97-CV-775, 1998 WL 1988556 (W.D. Wash. May 29,
1998) (applying tiered analysis). Given that the Gifford Pinchot
court cited a NEPA case in its approval of "tiered analysis," this
court will assume that tiered analysis under ESA will be conducted
in a manner analogous to that conducted under NEPA. In that
regard, NEPA's regulations describe "tiering" as "refer[ring] to
the coverage of general matters in broader environmental impact
statements (such as a national program or policy statements) with
subsequent narrower statements or environmental analyses (such as
regional or basin-wide program statements or ultimately site-
specific statements) incorporating by reference the general
discussions and concentrating solely on the issues specific to the
statement subsequently prepared." 40 C.F.R. § 1508.28.

1 programmatic BiOp was supplemented by the 2001 BiOps, which
2 served as project-specific environmental analysis. As I now
3 explain, even with this tiered consultation, defendants have not
4 met their obligations under ESA.

5 With regard to the winter-run chinook and critical habitat,
6 Federal defendants assert that NMFS initially considered
7 critical habitat in the 2000 Programmatic BiOp, but admit that
8 the BiOp stated that the long-term contract renewals would be
9 subject to a separate, tiered analysis.²⁸ Fed. Defs.' Br. at 12.
10 There is no mention of, much less extensive discussion of,
11 "recovery" in this passage. Clearly, it is insufficient to
12 overcome the Ninth Circuit's presumption.

13 In addition to citing the passage from the 2000 BiOp,
14 defendants attempt to overcome Gifford Pinchot's presumption by
15 referencing a section of NMFS's 2001 BiOp which discusses
16 alleged improvements in the environmental baseline.²⁹ While this

17 ²⁸ The passage that Federal defendants cite to in NMFS's
18 November 14, 2000 programmatic BiOp explains that "the proposed
19 implementation of the CVPIA . . . are anticipated to beneficially
20 affect Sacramento River winter-run chinook salmon, Central Valley
21 spring-run chinook salmon, Central Valley steelhead, and their
22 designated critical habitat." See BORESA 029586. The BiOp also
explicitly states that new CVPIA project actions which may affect
listed Central Valley anadromous salmonids or critical habitats
will be addressed through future individual section 7
consultations." Id.

23 ²⁹ The NMFS BiOp states that:

24 There also has been and will continue to be improvements
25 in the environmental baseline as a result of
26 implementation of CVPIA anadromous fisheries restoration
plan and (b)(2) provision. Also implementation of
CALFED's ecosystem restoration program and environmental

1 section of the BiOp mentions "improving habitat" and
2 "restoration," it is clear that NMFS's discussion of improving
3 habitat occurs in the context of the environmental baseline,
4 rather than in the context of protection of habitat critical for
5 the species' recovery.³⁰ The Services, however, must analyze

6
7 water account have improved the environmental baseline
8 by improving habitat, increasing habitat, increasing
9 survival of juvenile salmon and steelhead, and providing
10 tools to minimize the direct and indirect effects of the
11 delta pumping facilities. This improvement in the
12 environmental base line increases the resiliency of the
13 listed salmon populations to the effect of deliveries
14 pursuant to these contracts and provides resources to
15 provide habitat for spawning and rearing of steelhead in
16 the Stanislaus and Tuolumne Rivers, despite the
17 potential for reduction in flow from Friant to increase
18 demands on these Rivers for contributions to pulse
19 flows.

20 BORESA 041555.

21
22 ³⁰ The environmental baseline for Section 7 consultation
23 purposes is defined as follows:

24 The environmental baseline includes the past and present
25 impacts of all federal, state, or private actions and
26 other human activities in the action area, the
anticipated impacts of all proposed federal projects in
the action area that have already undergone formal or
early section 7 consultation, and the impact of state or
private actions which are contemporaneous with the
consultation in process.

50 C.F.R. § 402.02.

21 In other words, the environmental baseline is a "snapshot in
22 time," which allows agencies to understand existing conditions
23 before they consider the effects of a proposed action on those
24 conditions. See Tony A. Sullins, ESA Endangered Species Act, Basic
25 Practice Series, 2001 (American Bar Association Publishing), at 68-
26 69. As plaintiffs explain, NMFS's BiOp contains no discussion of
how and whether these improvements in the baseline affect the value
of critical habitat for recovery. Pls.' Br. at 21. Further, as
plaintiffs note, a listed species may experience improvements in
the environmental baseline and still not recover. See 16 U.S.C.

1 "recovery in the context of critical habitat, the sense in which
2 recovery evaluation is required by the ESA," rather than in
3 another context. Gifford Pinchot, 378 F.3d at 1074 (rejecting
4 discussion of "recovery" as it is "promoted by the [National
5 Forest Plan]," a comprehensive programmatic BiOp). The Court
6 explained that there must be "discussion of the specific impact"
7 of the proposed action - here the contract renewals - on
8 critical habitat and recovery of the species. It emphasized
9 that this distinction is important, especially "when considered
10 in the context of the agency's regulation and the presumption of
11 regularity."

12 Federal defendants also point to a passage discussing the
13 indirect effects, including reverse flows and cross delta
14 transport of water, of the contract renewals on the winter-run
15 chinook. See BORESA 041554. Nowhere in this passage, however,
16 does NMFS discuss or even mention recovery of winter-run chinook
17 or the contract renewals' impact on critical habitat. I
18 conclude that the defendants have not borne the burden of
19 demonstrating that its reliance on the erroneous regulatory
20 definition of "adverse modification" was harmless. The critical
21 habitat analysis of the winter-run chinook salmon is therefore
22 fatally flawed.

23 ////

24 ////

25 § 1532(3) ("recovery" means ESA protections are no longer
26 necessary").

1 **3. Listed Terrestrial and Freshwater Species' Recovery**
2 **(Plaintiffs' Fifth Claim)**

3 It is undisputed that, at the time of the consultation at
4 issue, FWS had designated critical habitat for at least seven
5 species, the California condor, Delta smelt, Fresno kangaroo
6 rat, least Bell's vireo, Little Kern golden trout, Southwestern
7 willow flycatcher, and Valley elderberry longhorn beetle.
8 BORESA 039978-80. Plaintiffs contend that under Gifford
9 Pinchott, defendants' analysis of adverse modification of
10 critical habitat for these species was improper. I now address
11 defendants' various arguments in opposition to plaintiffs'
12 contention.

13 As Friant defendants maintain, plaintiffs failed to
14 provide the 60-day notice of ESA violation as to the California
15 condor, the least Bell's vireo, and the Southwestern willow
16 flycatcher. Accordingly, they argue, a condition precedent to
17 suit has not been fulfilled.

18 Section 11(g) of ESA permits citizens suits to enforce
19 compliance with the Act. 16 U.S.C. § 1540(g). Before such a
20 suit, however, plaintiff must give the Secretary of the Interior
21 and any alleged violators written notice of intent to sue sixty
22 days prior to filing. This requirement is jurisdictional. Save
23 the Yaak Comm. v. Block, 840 F.2d 714, 721 (9th Cir. 1988). As
24 just noted, plaintiffs here did not do so as to certain species.
25 The question, however, is whether this aspect of plaintiffs'
26 suit is properly viewed as a citizen suit.

1 In Bennett v. Spear, 520 U.S. 154 (1997), the Supreme Court
2 held that suits against the Secretary of the Interior, acting in
3 his capacity as Administrator of ESA, which challenge the
4 adequacy of biological opinions are not necessarily citizen
5 suits under 11(g) of the Act. Rather, the Court held, such
6 claims could be pled under the Administrative Procedure Act,
7 which authorizes courts to set aside agency actions found to be
8 "arbitrary, capricious, an abuse of discretion or otherwise not
9 in accordance with the law." Id. at 177.

10 In conformance with the Bennett holding, the Ninth Circuit
11 has instructed that so long as it is properly pled under the
12 APA, challenges to the adequacy of biological opinions can be
13 pursued notwithstanding a failure to meet the sixty-day notice
14 requirement. American Rivers v. Nat'l Marine Fisheries Serv.,
15 126 F.3d 1118, 1124 (9th Cir. 1997). Plaintiffs have pled both
16 APA and ESA claims against the agencies relative to the asserted
17 deficiencies of the BiOps, and thus the court has jurisdiction
18 to consider any claims that those biological opinions are
19 inadequate.³¹

20 As noted, FWS designated critical habitat for at least
21 seven species considered in this consultation. BORESA 039978-

23 ³¹ Once again, this court is perplexed by a holding of courts
24 by which it is bound. The APA provides a right to judicial review
25 of all "final agency action for which there is no other adequate
26 appear to preclude suit under the APA. See Middlesex County Sewage
Authority v. National Seaclammers Association, 453 U.S. 1 (1981).

1 80. Plaintiffs contend that defendants summarily concluded that
2 the proposed action would not "adversely modify" critical
3 habitat without considering recovery, or did not come to any
4 conclusion as to the species.³²

5 Federal defendants assert that the designated critical
6 habitat was not within the action area encompassed by the
7 consultation and so it was not affected by the proposed action.
8 Fed. Defs.' Br. at 14. They cite to various passages in the
9 2001 BiOp which they assert shows that these species' "critical
10 habitat is not within the action area," and thus, they contend,
11 FWS's "no adverse modification" conclusion was "reasonable."
12 Id. at 14-15. I cannot agree.

13 I begin by noting that defendants' argument that the
14 contract renewals would have no effect on critical habitat
15 because the habitat lies outside of the Friant contract service
16 areas is undermined by the BiOp. FWS explained there that the
17 contracts' impact extends beyond the contract area by virtue of
18 both direct and indirect effects.³³ Pls.' Br. at 24.

19 Defendants' argument fails for yet another reason.

20 In those cases where the FWS articulated a reason for its
21 conclusion, it did not articulate Federal defendants' litigation

22 ³² As plaintiffs point out, FWS did not even reach an adverse
23 modification conclusion as to the Least Bell's Vireo. The court's
24 review of the record supports this allegation, and it also appears
25 that FWS failed to reach a conclusion on adverse modification as
to the Little Kern Golden Trout.

26 ³³ For ESA Section 7 purposes, the agencies must examine both
the "direct" and "indirect effects." 50 C.F.R. § 402.02.

1 position as the reason why it determined that some of these
2 species would not be adversely affected.³⁴ Put bluntly,
3 defendant's litigation position is besides the point. The
4 question is whether the articulated reasons in the record
5 demonstrate that FWS' decisions were based on a consideration of
6 the relevant factors, and whether FWS articulated a rational
7 connection between the facts found and the decisions. Nev. Land
8 Action Ass'n v. United States Forest Serv., 8 F.3d 713, 716 (9th
9 Cir. 1993).

10 Gifford Pinchot made clear that in considering whether the
11 proposed action adversely modifies critical habitat, FWS must
12 consider both the species' survival and recovery. Thus, as with
13 the spring-run chinook salmon, this court must determine whether
14 FWS ignored its own regulation and considered both recovery and
15 survival in its adverse modification analysis for each species.
16 Below, the court does so for each of the listed species with
17 critical habitat.

18 **a. California Condor**

19 FWS concluded that the proposed action would not adversely
20 modify the critical habitat of the California Condor, even
21 though there is scant discussion of the condor's habitat. The
22 BiOp notes that the decline of condor population is "attributed
23 to human persecution, pesticide use, lead poisoning, and habitat
24 loss." BORESA 040050-51. The BiOp, however, appears to contain

25 ³⁴ In many cases, the agency did not articulate any reason
26 for its conclusion.

1 no discussion whatever of the effect of the contract renewal on
2 "critical habitat," much less mention of recovery or
3 conservation. Defendants insist that because the condor's
4 habitat is not within the action area it is not affected
5 negatively by the proposed action. Again, if defendants'
6 litigation position was the basis for FWS determination the
7 agency was required to say so in the BiOp, and support that
8 reasoning with a meaningful analysis. The court "cannot infer
9 that analysis was conducted but not described in the BiOp."
10 Gifford Pinchot, 378 F.3d at 1074.

11 **b. Delta Smelt**

12 Plaintiffs admit that FWS did discuss "recovery" in
13 connection with its effects analysis for the Delta smelt, but
14 they argue that the discussion is inadequate. In light of
15 Gifford Pinchot, the court must agree.

16 The BiOp states that the "renewal of contract [sic] would
17 also adversely impact" the Delta smelt, and although the
18 contracts would "slow down" the Delta smelt's recovery, certain
19 unspecified "commitments" made by the Bureau in the context of
20 an earlier consultation on CVP operations would allow "eventual"
21 recovery of the smelt. BORESA 040125. Although, as plaintiffs
22 concede, this is the most in-depth analysis provided by FWS as
23 to any of the listed species with designated critical habitat,
24 the discussion is insufficient for several reasons.

25 I begin by noting that while the BiOp acknowledges that the
26 contracts will slow down recovery of the smelt, there is no

1 connection drawn between this adverse impact and its
2 ramifications on the critical habitat of the species. Moreover,
3 as plaintiffs assert, the analysis must not focus on whether
4 eventual recovery is possible, but whether the value of the
5 habitat is "diminishe[d]" for a species' recovery. 50 C.F.R.
6 § 402.02. Finally, FWS's BiOp offers no factual support for its
7 contention that recovery remains possible. Under the APA,
8 defendants must make a connection between the facts found and
9 conclusion drawn. There are no facts provided for the assertion
10 that recovery is possible. In sum, the BiOp is simply
11 inadequate by any measure.

12 **c. Fresno Kangaroo Rat**

13 Federal defendants argue that FWS has met its burden as to
14 the Fresno kangaroo rat because the BiOp states that the Fresno
15 kangaroo rat's recovery was discussed in the Upland Recovery
16 Plan. BORESA 040059. The parties did not submit the Upland
17 Recovery Plan for the court's consideration (or, at the very
18 least, it was not easily found by the court) - thus, it is
19 unclear what the Upland Recovery Plan actually discussed.³⁵
20 Moreover, even if the plan were submitted and it had some in
21 depth discussion as to the kangaroo rat, this would be

22
23 ³⁵ The massive administrative record required the court to
24 warn the parties that a reference to a document which does not
25 contain a citation to that record will be treated as an admission
26 that the document is not contained within that record. As the
Seventh Circuit has aptly remarked "[j]udges are not like pigs,
hunting for [buried] truffles" United States v. Dunkel,
927 F.2d. 955-56 (7th Cir. 1991).

1 insufficient to meet ESA's requirements because FWS would need
2 to draw a connection between the Upland Recovery Plan and the
3 adverse modification standard within the four corners of the
4 BiOp.

5 The court does note that "critical habitat" is mentioned
6 with respect to the Fresno kangaroo rat. The BiOp states that
7 "[c]ritical habitat designated for the species lies about 7
8 miles west of Fresno ID," and that "[a]ppropriate habitat
9 management of protected lands . . . is also urgently needed."
10 BORESA 040117. Although "critical habitat" is mentioned, it is
11 discussed in a more general context - on measures to improve the
12 species's state over all - and thus the FWS did not address the
13 contract renewal's "specific impact" on the Fresno kangaroo's
14 critical habitat and its recovery, as Gifford Pinchot requires.
15 See 378 F.3d at 1074. Indeed, it appears that the "proposed
16 contract renewal" is not even mentioned in the discussion of
17 this species. Common sense as well as binding precedent
18 dictates that "even the mention of 'recovery' does not indicate
19 analysis of recovery in the context of critical habitat." Id.
20 at 1074. I conclude that FWS has not shown that it ignored its
21 unlawful regulatory definition in its discussion of the Fresno
22 kangaroo rat.

23 **d. Little Kern Golden Trout and Least Bell's Vireo**

24 Beyond explaining where the Little Kern Golden Trout's
25 critical habitat is located, see BORESA 040071, the only other
26 mention of the species in the entire BiOp is where FWS admits

1 that it "has no information on possible effects from pesticide
2 drift on the Little Kern River golden trout," BORESA 040120.
3 This one mention insufficiently meets Gifford Pinchot's mandate
4 that the BiOp must discuss the federal action's impact on the
5 species' recovery.

6 As for the least Bell's vireo, the BiOp explains that "the
7 least Bell's vireo has sufficient populations in their southern
8 range to sustain the species in the foreseeable future," and
9 that "restoration of riparian habitat in the San Joaquin Valley
10 was identified as a critical task to recovery." There is no
11 further analysis of these species. Although "recovery" is
12 mentioned in one sentence in the context of critical habitat as
13 to the least Bell's vireo, that is hardly sufficient to rebut
14 the presumption that FWS ignored its adverse modification
15 regulation. Moreover, even if the reference were somehow
16 sufficient, FWS failed to draw any conclusion as to adverse
17 modification for the least Bell's vireo even though the BiOp
18 acknowledges that critical habitat was designated for the
19 species. It is not surprising that with the complete absence of
20 analysis for the Little Kern golden trout, FWS also failed to
21 reach a conclusion as to adverse modification for the Little
22 Kern Golden trout, even though it was listed as a species with a
23 critical habitat designation.³⁶ BORESA 039979.

24
25 ³⁶ The section of the opinion that articulated conclusions as
26 to the critical habitat of the other species does not mention the
Little Kern Golden Trout or the Least Bell's Vireo. BORESA 040128.
It might be argued that FWS concluded that there was no adverse

e. Southwestern Willow Flycatcher & Valley Elderberry Longhorn Beetle

FWS concluded that the renewal of the contracts would not adversely modify the critical habitat of the southwestern willow flycatcher and the valley elderberry longhorn beetle. BORESA 040128. Defendants assert that FWS did not have to engage in the required adverse modification analysis set forth in Gifford Pinchot because these two species' habitat were outside the contract service areas. As discussed above, this argument fails. Again, even if this contention represented a viable defense, the BiOp was required to contain a rational connection between such a conclusion and the facts it relied upon. It did not and, as noted, defendants cannot now make a post-hoc connection for FWS. Gifford Pinchot, 378 F.3d at 1074.

The court has independently examined the BiOp and although FWS did mention "recovery" and "critical habitat" as it relates to these two species, it failed to discuss recovery in the critical habitat context, as required under Gifford Pinchot. The BiOp notes that "restoration of riparian habitat along the Central valley" would be "critical to the recovery of these species." BORESA 040125. At best, it may be said that "recovery" is discussed in a very general way but FWS failed to

modification through its silence, a conclusion this court may not draw. "We cannot infer an agency's reasoning from mere silence," that "in considering the BiOps, we may only rely on what the agency said in the record to determine what the agency decided and why." Gifford Pinchot, 378 F.3d at 1072 (citing Beno v. Shalala, 30 F.3d 1057 (9th Cir. 1994)).

1 analyze how the contract renewals would actually impact the
2 species' critical habitat.³⁷

3 In sum, as with the critical habitat analysis for the
4 winter-run chinook salmon, the critical habitat analyses as to
5 the other listed species is insufficient. Given the failure of
6 the record to rebut the presumption that the Services relied on
7 an invalid regulation, I conclude that the NMFS and FWS 2001
8 BiOps were arbitrary and capricious because they failed to
9 adequately discuss the "adverse modification" prong required
10 under the Endangered Species Act.

11 **C. THE AGENCIES' S JEOPARDY ANALYSIS**

12 In addition to challenging the consulting agencies'
13 critical habitat analysis, plaintiffs also object to their
14 jeopardy analyses on a number of grounds. I turn to those
15 contentions.

16 Section 7(a)(2) of ESA, 16 U.S.A. § 1536(a)(2), requires
17 that the Secretary of the Interior ensure that an action of a
18 federal agency is not likely to jeopardize the continued
19 existence of any threatened or endangered species.³⁸ Section

20
21 ³⁷ Friant defendants urge this court to consider FWS's 2000
22 programmatic BiOp for the CVPIA where FWS explained that "[t]hus,
23 restoration of riparian habitat along the Central Valley, their
24 historical habitat, is critical to the recovery of these species."
Assuming arguendo that a tiered analysis under these circumstances
is appropriate, the language from the 2000 BiOp failed to discuss
recovery in the context of the proposed action's effects on the
species' critical habitat, as Gifford Pinchot requires.

25 ³⁸ "'Jeopardize the continued existence of' means to engage
26 in an action that reasonably would be expected, directly or
indirectly, to reduce appreciably the likelihood of both the

1 7(b) sets out a process of consultation requiring the agency
2 with jurisdiction over the protected species to issue to the
3 Secretary a "biological opinion" evaluating the nature and
4 extent of jeopardy posed to that species by the action, 16
5 U.S.C. § 1536(b), after the action agency provides the Secretary
6 with "the best scientific and commercial data available." 16
7 U.S.C. § 1536(a)(2). If the biological opinion concludes that
8 the proposed action is likely to jeopardize a protected species,
9 the action agency must modify its proposal.

10 **1. The Services' Effects Analysis (Plaintiffs' Fifth Claim)**

11 Plaintiffs' first contention is that FWS failed to consider
12 all of the effects of the renewed contracts. They maintain that
13 FWS failed to consider the effects of interrelated and
14 interdependent operations and maintenance activities, and that
15 it failed to render a BiOP on the effects of water delivery
16 amounts actually authorized by the water contracts.

17 **a. Effects of Interrelated and Interdependent**
18 **Operations and Maintenance**

19 In fulfilling its interagency consultation obligations
20 under § 7 of the ESA, the consulting agency must consider the
21 "entire agency action." Conner v. Burford, 848 F.2d 1441, 1453-
22 54 (9th Cir. 1988). This includes the effects of the federal

23
24 survival and recovery of a listed species in the wild by reducing
25 the reproduction, numbers or distribution of that species."
26 Interagency Cooperation - Endangered Species Act of 1973, as
amended, 51 Fed.Reg. 19,958 (1986) (codified at 50 C.F.R. § 402.02)
(1986)).

1 action along with the impact of "interrelated and
2 interdependent" actions. 50 C.F.R. § 402.02(d).³⁹ The test for
3 interrelated or interdependent effects is "but for" causation,
4 i.e., but for the proposed action, would the other action occur.
5 51 Fed.Reg. 19932 (1986); Sierra Club v. Marsh, 816 F.2d 1376,
6 1387 (9th Cir. 1987).

7 In Connor, the Circuit explained that FWS was required to
8 consider the consequences of all stages of oil and gas activity
9 in rendering a BiOP. 848 F.2d at 1453-54. The court concluded
10 that FWS's decision to utilize "incremental-step consultation"
11 was a breach of its duty since such an approach "did not
12 consider all phases of the agency action." Id. at 1453. The
13 court emphasized that "agency action" is to be interpreted
14 "broadly," because "[c]aution can only be exercised if the
15 agency takes a look at all the possible ramifications of the
16 agency action." Id.

17 Here, plaintiffs contend that FWS excluded consideration of
18 interrelated and interdependent operations and maintenance
19 activities, despite the subject action being part of a larger
20

21 ³⁹ "Effects of the action" refers to direct and indirect
22 effects of an action on the species or critical habitat, together
23 with the effects of other activities that are interrelated or
24 independent with that action, that will be added to the
25 environmental baseline. Indirect effects are those that are caused
26 by the proposed action and are later in time, but still are
reasonably certain to occur. Interrelated actions are those that
are part of a larger action and depend on the larger action for
their justification. Interdependent actions are those that have
no independent utility apart from the action under consideration.
50 C.F.R. § 402.02.

1 agency action. Plaintiffs observe that FWS's BiOp identifies
2 thirteen activities that were excluded from the consultation
3 which, they assert, may adversely impact listed species and
4 their habitats. Pls.' Br. at 30-31, citing BORESA 039977. The
5 court finds that the record supports the conclusion that FWS
6 unlawfully segmented its consultation.

7 The 2001 BiOp acknowledges that the "no jeopardy opinion"
8 did not consider "Operation and Maintenance on Federal and
9 District lands used to convey CVP water" and "Operation and
10 Maintenance Plans." BORESA 039977. These actions, it asserted,
11 "will require separate determinations regarding their potential
12 effects on threatened and endangered species and critical
13 habitat pursuant to section 7" Id. In the
14 "commitments" section of the BiOp, where FWS explained the
15 measures that it assumed would be "fully implemented," the BiOp
16 acknowledged that operation and maintenance activities "have
17 been addressed using a phased approach."⁴⁰ In making this
18 commitment to address operation and maintenance activities, FWS
19 acknowledges the potential impacts of these activities on

20
21 ⁴⁰ FWS explained that "phase I" consisted of "procedures
22 which are to be followed on United States lands administered by
23 Reclamation," that "phase II" "addresses the identification of
24 sensitive sites and the creation of site-specific measures to avoid
25 adverse impact to those species," and that "phase
26 III . . . establish[ed] Integrated Pest Management procedures and
the implementation of erosion control plans." BORESA 040027. The
schedule for beginning implementation of phase I was three months
following the date of the Friant opinion, and phase II and III were
to begin by the end of 2001. Id. FWS claimed that Operations and
Maintenance Manuals would be distributed to Districts "within 1
year of this opinion." Id.

1 species. (The BiOp provides that "phase II" was dedicated to
2 addressing "sensitive sites" and the creation of measures to
3 "avoid adverse impact to those species." Id.). As I now
4 explain, however, the record also demonstrates that operations
5 and maintenance activities were interrelated and interdependent
6 actions which had the potential to adversely impact protected
7 species, and thus should have been included in the consultation.

8 The BiOp recognizes that operation and maintenance of
9 canals is a part of the agency action because it is part of the
10 water delivery process. See USBR ESA AR 039981 (water for the
11 Friant Division is impounded behind Friant Dam and then
12 "released to the 152-mile long [Friant Kern Canal] which flows
13 south and to the 36-mile long [Mader Canal] which flows north.
14 FWS AR 08022253 (Bureau's Biological Assessment on Long-Term
15 Contract Renewal states that study area for Section 7
16 consultation includes "Friant-Kern Canal, and the Madera
17 Canal"). In a memorandum from Laura Allen, Deputy Regional
18 Environmental Office, to Field Supervisor, U.S. Fish & Wildlife
19 Service (November 25, 2002), where the Bureau requested
20 consultation on implementing an operations and maintenance plan
21 committed to in the 2001 FWS BiOp, "operations and maintenance
22 of facilities" was described as:

23 . . . functioning to protect the integrity of the
24 canal and distribution systems so that the structures
25 may operate efficiently and safely. Routine
26 maintenance activities of the canal rights-of-way
include, but are not limited to, filling erosion
gullies and holes, use of herbicides, and use of
rodenticides to prevent damaging burrowing activity by

1 ground squirrels. Adverse impacts to listed species
2 can also be caused by some of these activities if they
3 are not performed properly with environmental concerns
4 taken into consideration.

5 Exhibit 3 to Pls.' Motion to Augment Record (Nov. 19, 2004).⁴¹

6 Because the delivery of water under the contracts cannot be
7 accomplished without the use of canals, operations and
8 maintenance activities are "interrelated actions," or actions
9 which are part of a larger action and depend on the larger
10 action for their justification. 50 C.F.R. § 402.02. "ESA
11 requires that the biological opinion detail how the agency
12 action affects the species or its critical habitat." Connor,
13 848 F.2d at 1453 (internal quotation omitted). The impact of
14 operations and maintenance activities - such as construction,
15 earth moving, erosion control, and pesticide control - have far-
16 reaching and adverse consequences for protected species.⁴² FWS

17 ⁴¹ Friant defendants argue that this record is irrelevant
18 because it describes "the Field Operations Manual developed by the
19 South Central California Area Office (SCAAO) of the Bureau of
20 Reclamation" and not "the operation and maintenance of the Friant-
21 Kern Canal or the Madera Canal." They appear to be in error.
22 SCAAO includes the Central Valley Project facilities (including the
23 Madera Canal and the Friant-Kern Canal), the Cachuma Project, Santa
24 Maria Project, and the Ventura River Project. See Board of
25 Reclamation Website, available at
26 http://www.usbr.gov/mp/area_offices.html (viewed on April 5, 2005).

Clearly, the "Field Operations Manual" is relevant in
considering the potential impacts of Operations and Maintenance
activities because it lays out the potential impact of such
activities and is "intended for use by Reclamation field staff and
for entities contracted to protect and maintain Reclamation
facilities."

⁴² According to the operations and maintenance manual,
"[h]erbicide treatment of plants that provide food or habitat for
listed species could cause death or injury to some individuals of

1 failed to comply with ESA by not including in its BiOp how
2 operations and maintenance activities affect species and its
3 critical habitat.

4 Federal defendants contend that FWS complied with ESA and
5 that the plaintiffs' argument is a "red herring" because they
6 have completed four O&M manuals, which provide the framework for
7 the Bureau and contractors to conduct future maintenance
8 activities. Beyond that, they maintain, an action agency is not
9 required to "engage in speculation in an attempt to identify
10 potential adverse effects." Fed. Defs.' Br. at 21. Friant
11 defendants make a similar argument, responding to plaintiffs'
12 argument by asking: "How in the world is Reclamation supposed to
13 consult with FWS - other than programmatically - about erosion
14 gullies, gopher holes, and the burrowing activity of ground
15 squirrels? Which gullies? Which gopher holes? Which squirrel
16 burrows? . . ." Friant Defs.' Br. at 48.

17 Defendants maintain that FWS ultimately satisfied ESA
18 because operations and maintenance activities were
19 considered in FWS's November 2000 Programmatic Biological
20 Opinion. Friant Defs.' Br. 45-46. The argument is not
21 persuasive.

22
23 _____
24 those species," ground disturbance associated with routine
25 maintenance "can crush or bury animals and plants and destroy
26 burrows" of listed species," "[d]irect feeding upon any rodenticide
bait would likely kill or cause serious injury to any animal,"
application of herbicides may also "have direct adverse effects
upon amphibians through contact with their skin." Ex. 3 to Pl.'s
Motion to Augment Record (Nov. 19, 2004).

1 It is important to note that the 2000 BiOp discussion is to
2 be used only for "programmatic purposes." The O&M discussion
3 spans approximately 3 pages and is very general in nature,
4 describing future commitments and consultations. Further,
5 although the 2000 BiOp made clear other documents could be
6 tiered from it, the BiOp also made clear that it could not be
7 used to supplant the analysis required for actions, such as the
8 long-term contract renewal, which required separate section 7
9 analysis ("It is understood that these provide only general
10 information and the Service and Reclamation will work together
11 on site specific needs for operation and maintenance actions").
12 BORESA 052990.

13 While it is true that FWS and the Bureau could not have
14 known about all the potential impacts of individual O&M
15 activities, this argument misses the mark. The law requires
16 consideration of the effects of interrelated and interdependent
17 activities whether or not all of the activities' impact is
18 known. ESA requires that BiOps consider the entire agency
19 action. Sierra Club v. Marsh, 816 F.2d 1376, 1387 (9th Cir.
20 1987). Here, it is undeniable that maintenance activities
21 allowed for the water delivery under the contracts and would not
22 have occurred "but for" the renewal of the contracts. FWS's
23 "phasing approach" to O&M activities was "not coextensive with
24 the agency action" and was therefore arbitrary, capricious and

25 ////

26 ////

1 not in accordance with the law. Connor, 848 F.2d at 1457-58.⁴³
2 The court wishes to be clear, it may well be that some O&M
3 activities could not be accounted for in the BiOp because they
4 were unknown. The fact that extensive O&M activities was
5 absolutely certain, however, requires that the activities be
6 analyzed under § 7.

7 **b. FWS's Use of Historical Average Water Deliveries**

8 Plaintiffs contend that FWS's jeopardy opinion should be
9 set aside on yet another ground. They argue that FWS consulted
10 on an amount of water that is significantly less than what was
11 authorized by the water contracts. They maintain that § 7
12 requires that the action agency consult, and that FWS render
13 BiOps on the effects of the action that is actually authorized
14 by the action agency. 50 C.F.R. §§ 402.02, 402.14.⁴⁴ The

15 ⁴³ In American Rivers v. United States Army Corps of
16 Engineers, 271 F.Supp.2d 230, 255 (D.D.C. 2003), the court
17 explained why segmented consultations do not conform to the the
18 requisites of the statute:

19 If FWS were allowed to apply such a limited scope of
20 consultation to all agency activities, any course of
21 agency action could ultimately be divided into multiple
22 small actions, none of which, in and of themselves would
23 cause jeopardy. Moreover such impermissible
24 segmentation would allow agencies to engage in a series
25 of limited consultations without ever undertaking a
26 comprehensive assessment of the impacts of their overall
activity on protected species.

23 ⁴⁴ "Action" means all activities or programs of any kind
24 *authorized, funded, or carried out*, in whole or in part, by Federal
25 agencies in the United States or upon the high seas. Examples
26 include, but are not limited to: (a) actions intended to conserve
listed species or their habitat; (b) the promulgation of
regulations; (c) the granting of licenses, contracts, leases,
easements, rights-of-way, permits, or grants-in-aid; or (d) actions

1 record reflects that FWS failed to do so, instead consulting on
2 approximately less than half of what was authorized in the long-
3 term contracts.

4 Defendants maintain that the regulation is in the
5 alternative, "*authorized, funded, or carried out*", and the
6 agencies consulted on the amount of water actually to be
7 delivered as determined by historic deliveries, i.e., "carried
8 out." Even assuming that the regulation is in the alternative,
9 the argument fails.

10 It is clear that the language "carried out" is
11 retrospective, and thus is not relevant to the matter at bar,
12 which is the consummation of contracts for the future delivery
13 of water. Because the contracts are for future delivery, and
14 the amount of water actually to be delivered will vary from year
15 to year and is thus uncertain, the only alternative which
16 applies is the amount of water authorized to be delivered by
17 those contracts. Put another way, the contemplated action is
18 the execution of the water contracts. That execution will
19 authorize the delivery of water, but clearly the execution of
20 the contracts will not, in itself, carry out that delivery. As
21 I now explain, given this conclusion, the BiOp was inconsistent
22 with the agencies' ESA duties.

23 ////

24 _____
25 directly or indirectly causing modifications to the land, water,
26 or air. 50 C.F.R. §402.02. The agencies must consult on the
effects of "the action" and cumulative effects on the listed
species or critical habitat. 50 C.F.R. § 402.14.

1 The Friant long-term contracts cumulatively authorized the
2 Bureau to deliver more than 2.1 million acre-feet of water per
3 year, for twenty-five years.⁴⁵ Rather than analyzing the effects
4 of 2.1 million acre-feet of water delivery, FWS explained that
5 its "effects analysis is conducted under the expectation that
6 water will be delivered to CVP service contractors in quantities
7 that approximate historic deliveries (1988 through 1997), as
8 given in Appendix D of the November 21, 2000 programmatic long-
9 term CVP contracts consultation." This assumption was made, the
10 BiOp explained, because "delivery of full contract quantities is
11 unrealistic." BORESA 040105. An examination of Appendix D
12 reveals that the historic deliveries for the water districts at
13 issue totaled over 850,000 acre-feet.⁴⁶ Further, Table 1.4,
14 which is included in the 2001 BiOp and which lists the Friant
15 Division and Cross Valley Water Contractors, puts the historic
16 annual deliveries at 799,411 for the Friant districts and 53,574

17
18 ⁴⁵ The BiOp states that "[f]ull entitlements" under the
19 contract are 2,115,975 acre-feet for the Friant Division and
20 128,300 acre-feet for the Cross-Valley Division. BORESA 039991.
21 However, as plaintiffs point out, FWS used several different
22 figures in describing the full quantity of water to be delivered.
23 In Table 1.4 of the BiOp, the "Total of All Entitlements" is listed
24 as 2,141,475 acre-feet, BORESA 039994, and where the Opinion
25 incorporates the contract quantities that were used in "Appendix
26 D" of an earlier consultation, the total contract quantities exceed
2.18 million acre-feet. BORESA 040105; BORESA 047873. While these
numbers vary slightly in the record, the court is satisfied that
the full quantity of water authorized by the contracts exceeded 2.1
million acre-feet.

⁴⁶ Appendix D lists all the CVP Contractors, rather than just
the CVP contractors involved in this dispute, but based on what the
court can tell, the amount of water consulted on is somewhere
between 850,000 and 950,000 acre-feet.

1 acre-feet for the Cross Valley Contractors. BORESA 039993-
2 039995.

3 Even though it is unclear what the exact amount of the
4 historic annual delivery was between 1988 and 1997 for all of
5 the water districts at issue, it appears clear that the amount
6 was approximately half of what the water districts were
7 authorized to receive through the contracts. Simply put, FWS
8 did not evaluate the effects of the entire authorized agency
9 action. Significantly, on the same day that the FWS BiOp was
10 issued, Frank Michny, of the Bureau of Reclamation, e-mailed an
11 FWS scientist, that:

12 Our view is that we are consulting on full contract
13 amts for each district, recognizing that total
14 deliveries in certain areas may be limited by OCAP.
15 We will agree that we will consult on any BOR action
16 that may affect listed species . . . If changing
17 project description to above results in a J[eopardy]
18 opinion I have been informed, "so be it."

19 FWS AR 08023996.⁴⁷

20 Just hours before the FWS BiOp was to be issued, the
21 Bureau's regional environmental officer explicitly told FWS that
22 it was to consult on "full contract amts," yet FWS failed to do
23 so. As discussed above, "biological opinions must be
24 coextensive with the agency action." Connor, 848 F.2d at 1457-
25 58 (9th Cir. 1988). There is no question that ESA requires that

26 ⁴⁷ During oral argument on April 13, 2005, the court asked
the parties which documents were considered part of the
administrative record. Counsel for Federal defendants conceded
that internal communications between the action agency and the
consulting agencies, including e-mails and other memorandum, were
to be considered part of the administrative record.

1 all impacts of agency action - both present and future effects -
2 be addressed in the consultation's jeopardy analysis. Id. The
3 fact that it was thought by FWS that "delivery of full contract
4 quantities is unrealistic" and that "deliveries continue to be
5 impacted by existing climate, hydrology, actions and statutes,
6 . . . socio-economic factors" does not excuse consulting on the
7 "entire agency action," which was the authorized delivery of
8 over 2.1 million acre-feet of water, and nothing less than
9 that.⁴⁸

10 Friant defendants' attempt to excuse FWS by pointing out
11 that FWS created a mechanism whereby it would coordinate with
12 Reclamation "when the quantity of water to be delivered to the
13 contractors *exceeds the average historical deliveries . . .*"
14 (emphasis in original).⁴⁹ BORESA 040105. Friant Defs.' Br. at
15 36. This argument is unavailing. ESA mandates that biological
16 opinions must be coextensive with the action authorized, 50
17 C.F.R. § 402.02, and does not permit incremental-step
18 consultations. Connor, 848 F.2d at 1457-58. Because 2.1
19 million acre-feet of water was authorized by the long-term
20 contracts, FWS was required to analyze the direct and indirect

21
22 ⁴⁸ The court must say it can't imagine why FWS thought the
23 Bureau was contracting for double the amount the Service thought
was realistic, and why the Bureau insisted it wasn't kidding.

24 ⁴⁹ The BiOp explains that FWS assumed "that, if deliveries
25 are to be provided in excess of the maximum historic
26 deliveries identified in that Appendix D, Reclamation will
determine if these deliveries may affect listed or proposed species
and/or critical habitat, and will include the Service in that
determination." BORESA 040105.

1 effects of delivering 2.1 million acre-feet of water.⁵⁰

2 Federal and Friant defendants argue that this court cannot
3 substitute its judgment for that of FWS, and that the decision
4 to analyze the average of actual water delivery amounts was
5 within FWS' discretion. I cannot agree.

6 While it is true that ESA does not dictate any specific
7 method FWS must employ to evaluate effects, it does require
8 using a method which adequately considers the impact of the
9 action. Selkirk Conservation Alliance v. Forsgren, 336 F.3d
10 944, 964 (9th Cir. 2003). The question here, however, is not
11 the method the agency employed to analyze impact, but what in
12 fact was the scope of the proposed activity.

13 The scope of agency action and the proper scope of FWS'
14 review are legal questions that do not require scientific
15 expertise, as defendants suggest. See Connor, 848 F.2d at 1453
16 (adopting D.C. Circuit test of determining adequacy of
17 biological opinion by matching the meaning of "agency action"
18 with a legal definition of term). This court, therefore, is not
19 required to defer to the FWS.

20 Moreover, even if I were required to give deference to the
21 Agency's decision, I would still conclude that FWS violated the
22 statute because it failed to analyze the proper scope of the

23 ⁵⁰ Plaintiffs also object to this mechanism created by FWS
24 because the trigger for further consultation is not reached until
25 the Bureau delivers 1,728,582 acre-feet per year (the maximum
26 historical deliveries to the Friant Division identified in Appendix
D), well in excess of the actual amount analyzed by FWS in its
BiOp. Pls.' Br. at 41.

1 project. In this regard, the Bureau candidly related the scope
2 of activity it sought to have authorized, and the FWS simply
3 ignored that request. Put differently, what method FWS employed
4 to analyze the effects was irrelevant since it was not analyzing
5 the activity in question. I conclude that FWS's decision to
6 consult on "historical annual deliveries," rather than the full
7 amount authorized by the contracts, violates ESA.⁵¹ 50 C.F.R.
8 § 402.02, 402.14.

9 **2. FWS' Assumption that the Bureau would Implement**
10 **Mitigation Measures (Plaintiffs' Fifth Claim)**

11 In the "effects" section of their 2001 BiOp, FWS explicitly
12 relies on a list of commitments contained in the BiOp which "are
13 intended to reduce, ameliorate, or reverse effects of the Friant
14 and Cross Valley water diversions," and that FWS "assumed that
15 these measures will be effective." FWS BORESA 040125. The
16 conclusion section of the BiOp states that the "conclusion" [of
17 no jeopardy] is "based on the assumption that measures in this
18 biological opinion are fully implemented." BORESA 040128.
19 Plaintiffs question FWS's reliance on the Bureau's commitments.
20 They argue that the assumption that the Bureau would follow
21 through with the commitments is arbitrary and capricious "[i]n
22

23 ⁵¹ Plaintiffs alternatively argue that even if FWS's use of
24 average historical deliveries rather than the authorized amounts
25 was lawful, FWS was at least obligated to explain why the data set
26 it chose to analyze accurately represented future deliveries.
Pls.' Br. at 37. Since it is clear that FWS consulted on something
other than the full amount authorized in the water contracts, the
court need not engage plaintiffs' alternative argument.

1 light of the Bureau's checkered track record with conservation
2 commitments it had made as part of biological opinions on
3 earlier rounds of Friant contracts."⁵² Pls.' Br. at 47.

4 Section 7 implementing regulations require the Services in
5 assessing the likely effects of an action, to take into account
6 "effects" that are "caused by the proposed action and are later
7 in time, but still are reasonably certain to occur." 50 C.F.R.
8 § 402.02. Mitigation measures must be reasonably specific,
9 certain to occur, and capable of implementation; they must be
10 subject to deadlines or otherwise enforceable obligations; and
11 most important, they must address the threats to the species in
12 a way that satisfies the jeopardy and adverse modification
13 standards. Sierra Club v. Marsh, 816 F.2d 1376, 1380, 1387-88
14 (9th Cir. 1987).

15 Although plaintiffs argue that the measures set forth in
16 the BiOp "were not reasonably certain to occur," most of their
17 arguments relate to the long history of consultation involved in
18 this case, beginning in 1991, rather than to the 2001 BiOp and
19 the consultation process surrounding it. Thus, they point out
20

21 ⁵² Plaintiffs also point to FWS internal documents where
22 staff or officials were skeptical of the Bureau's commitments. In
23 1999, Wayne White, the signatory of FWS' 2001 BiOP, noted that
24 "[o]ur earlier [no jeopardy opinion] was based on compliance which
25 they have not fulfilled." FWS AR 06015784. Similarly, in 2000,
26 FWS's CVPIA team noted that "[i]n past large scale, program-level
opinions we (the Service) have had considerable experience with BOR
not complying with biological opinions that we have written
. . . . It was apparent early on that the measures included to
reach no-jeopardy were insufficiently funded, on reasonably long
time lines, or not implemented at all." FWS AR 06018628.

1 that since 1991, the Bureau has still failed to provide FWS with
2 maps where listed species occurred, that the Bureau has still
3 failed to develop a plan to compensate for losses of endangered
4 species habitat from land conversion, and that the Bureau has
5 made limited progress on monitoring land use changes and ongoing
6 activities in the water districts. Pls.' Br. at 47. Indeed, in
7 their 2001 BiOp, FWS notes that the Bureau has made "limited
8 progress" or is "progressing" with some of the commitments just
9 noted. See FWS AR 01001535, 01001537, 040022, 03005772. As
10 stressed by defendants, however, FWS also noted that many of the
11 twenty-four commitments were being implemented, or in the
12 process of being implemented. Plaintiffs themselves concede
13 that the Bureau has implemented some of its prior commitments
14 ("This is not to say the Bureau had done nothing with respect to
15 its prior mitigation commitments; it had."). Pls.' Br. at 46.
16 Of the 24 or so commitments, it appears that FWS recognized that
17 the Bureau had made progress or was in the process of
18 implementing at least 20 of the commitments. Although it is not
19 unreasonable to describe the Bureau's "track record" as
20 discouraging, I cannot conclude that the commitments made in the
21 2001 BiOp "were not certain to occur, were not capable of
22 implementation, or were unenforceable." See Sierra Club v.
23 Marsh, 816 F.2d at 1830, 1387-88.

24 Accordingly, I cannot conclude that FWS' reliance on the
25 Bureau's commitments to implement the specified mitigation
26 measures was arbitrary, capricious, or not in accordance with

1 the law.

2 **3. NMFS' Jeopardy Analysis of Spring-run Chinook**
3 **Salmon and Steelhead (Plaintiffs' Sixth Claim)**

4 Plaintiffs challenge NMFS's jeopardy analysis of Central
5 Valley spring-run Chinook salmon and Central Valley steelhead.
6 Specifically, plaintiffs maintain that NMFS may not satisfy its
7 obligations under ESA relative to spring-run chinook and
8 steelhead by relying on its analysis of the winter-run chinook.
9 Plaintiffs also contend that defendants did not complete
10 consultation on steelhead and spring-run chinook before issuing
11 their "no jeopardy" determination in the 2001 BiOp. The record
12 supports plaintiffs' contentions.

13 NMFS's 2001 BiOp asserted, without elaboration, that there
14 were provisions in "the winter-run biological opinion . . .
15 designed to keep emigrating winter-run chinook juvenile on the
16 northern side of the delta" which would "also minimize exposure
17 of spring run chinook and steelhead." BORESA 041554. In
18 another section of the BiOp, NMFS explained that "an analysis of
19 the impacts of water storage and delivery within the CVP . . .
20 on winter-run Chinook salmon can be found in the existing NMFS
21 1993 biological opinion on the CVP/SWP Operations," which is
22 "representative of effects on spring-run chinook and steelhead
23 generally and more specifically where they overlap in
24 distribution." BORESA 041553. Put directly, there is no
25 explanation as to why measures designed to mitigate harm to the
26 winter-run chinook would also apply to the spring-run or

1 steelhead. If there is a scientific basis for this analysis,
2 NMFS was required to provide that explanation in its BiOp.
3 Under ESA, NMFS was required to articulate a rational connection
4 between the facts found and the decision made. It failed to do
5 so.

6 Plaintiffs' assertion that consultation on the spring-run
7 chinook and the steelhead was not completed prior to the "no
8 jeopardy" determination is also supported by the record. NMFS
9 explained that a 1993 BiOp which described operating criteria
10 and procedures necessary to avoid jeopardy of winter-run chinook
11 was being updated to include spring-run chinook salmon and
12 steelhead. NMFS also explained that with regard to the spring-
13 run chinook and steelhead, it could not determine the extent of
14 "take associated with the diversion of a volume of water
15 independent of consideration of operational criteria," so "it
16 would not authorize incidental take, but would defer until
17 completion of the revised opinion on CVP/SWP operations," which
18 was expected in March 2001, after the water contracts were to be
19 signed. BORESA 041537. In essence, NMFS admitted in its BiOp
20 that consultation on the steelhead and the spring-run chinook
21 had not been completed even as it issued its "no jeopardy"
22 determination in its 2001 BiOp.

23 Federal defendants concede that "at the time the NMFS 2001
24 BO was issued, a consultation on the effects of CVP operations
25 on spring-run chinook and steelhead was underway" rather than
26 completed. Fed. Defs.' Br. at 17. They argue that this was

1 acceptable because "effects on the listed species of the
2 delivery of certain volumes of water cannot be identified and
3 isolated from the effects of the larger operational parameters
4 of the CVP." Id. They also contend that NMFS justifiably
5 relied on the previous BiOp issued in 1993 to address the
6 effects of CVP operations on spring-run chinook and steelhead.
7 Id. The argument does not lie.

8 Put simply, if NMFS could not determine the extent of take
9 associated in isolation from larger CVP operations, which was
10 undergoing consultation concurrently, it was arbitrary and
11 capricious for it to issue its "jeopardy determination" on
12 steelhead and spring-run chinook before that consultation was
13 completed. See 16 U.S.C. § 1536(d).

14 Friant defendants again argue that this BiOp was "tiered"
15 off of other BiOps, including the 2000 Programmatic BiOp. This
16 argument, however, is unavailing since the 2001 BiOp made no
17 mention of the 2000 BiOp in its analysis and because the CVPIA
18 BiOp considered the implementation of the CVPIA, not site-
19 specific operations of the CVP. In fact, the 2000 BiOp
20 explicitly noted that "Long-term contract renewals are subject
21 to a separate, tiered analysis" BORESA 029563.

22 As with the winter-run chinook, Friant defendants also
23 argue that the proposed action has no effect on these species
24 because their critical habitat is not located in the action
25 area. Regardless of whether critical habitat is designated,
26 however, an agency must consult with the Secretary where an

1 action will "jeopardize the continued existence" of a species.
2 16 U.S.C. § 1536(a). The record indicates that there were
3 species of steelhead and spring-run chinook in areas that could
4 be affected by the contract renewals.⁵³ Finally, Friant
5 defendants point to other passages in the 2001 BiOp which they
6 imply may be "adequate" to meet ESA's rigorous standards.
7 Friant Defs.' Br. at 21. While the BiOp does contains other
8 passages about the steelhead trout and the spring-run chinook,
9 these passages appear to support a jeopardy finding, rather than
10 the "no jeopardy" determination issued by NMFS.⁵⁴ For all the
11 reasons stated above, I conclude that NMFS's no jeopardy
12 determination as to the spring-run chinook salmon and steelhead
13

14 ⁵³ NMFS's BiOp notes that the proposed action has the
15 potential to affect the spring-run and steelhead because "[a]ll
16 river reaches and estuarine areas of the Sacramento-San Joaquin
17 Delta may be used seasonally by adult and juvenile . . . spring-run
18 chinook salmon" BORESA 041550. The BiOp also notes that
19 "evidence has been gathered over the past few years that shows an
20 extant, self-sustaining run [of steelhead] in at least the lower
21 reaches of the San Joaquin River." BORESA 041551.

22 ⁵⁴ The BiOp stated that:

23 The diversions will continue to eliminate most of the
24 upper San Joaquin River's contributions to flows to
25 assist emigration of juvenile fall-run salmon and
26 steelhead in late winter and spring months The
Central Valley Steelhead ESU will be affected to the
extent that the small portion of the ESU that is present
in the San Joaquin system will continue to be precluded
from reoccupying the upper San Joaquin River. The
steelhead will also continue to experience diminished
flows to facilitate immigration and emigration. This
effect is minimized by ongoing programs to improve
rearing and migration conditions

BORESA 041553-54.

1 is not in accordance with the law.

2 **4. NMFS's Consultation with the Bureau on the Hidden and**
3 **Buchanan Contracts (Plaintiffs' Sixth Claim)**⁵⁵

4 According to plaintiffs, NMFS violated ESA because it
5 "never even attempted to conduct the analysis required by
6 section 7 or issue a biological opinion that addresses the
7 Hidden and Buchanan contracts." Pls.' Br. at 54. Once again,
8 the record supports the contention.

9 It is undisputed that the Hidden and Buchanan water units
10 are not part of the Friant Division, but provide CVP water to
11 two contractors in the Friant Division, Chowchilla Irrigation
12 District and Madera Irrigation District. FWS AR 08023621.
13 These two Friant districts have additional contracts with the
14 Bureau for delivery of water from the Hidden and Buchanan CVP
15 units. Pls.' SUF 13.⁵⁶ The Hidden Unit contract provides for
16

17 ⁵⁵ In contrast to NMFS, which did not formally consult with
18 the Bureau on the Hidden/Buchanan contracts, FWS did request formal
19 consultation. Although defendants also discuss FWS's consultation
on the Hidden/Buchanan units, plaintiffs did not address this in
their brief.

20 An internal FWS memorandum noted that a FWS biologist "decided
21 on 1-19-01 to not include Hidden and Buchanan Unit Contracts in the
22 Friant-Cross Valley Opinion due to insufficient time to make the
23 necessary changes in the project description and effects." BORESA
045889, 041752. On February 1, 2001, the Bureau formally requested
consultation with FWS on the Hidden and Buchanan contracts. Pls.'
SUF 19, citing FWS AR 09024891. On February 14, 2001, FWS issued
a new biological opinion for the Hidden and Buchanan contracts.
Pls.' SUF 16.

24 ⁵⁶ The contracts are referred to as Chowchilla Water
25 District, Buchanan Unit (Contract # 14-06-200-3844A-LTR1) and the
26 Madera Irrigation District, Hidden Unit (Contract #
14-06-200-4020A-LTR1). Id.

1 delivery of 24,000 acre-feet of water annually from Hensley Lake
2 to Madera Irrigation District. The Buchanan Unit contract
3 provides for delivery of 24,000 acre-feet annually from Eastman
4 Lake to Chowchilla Water District.⁵⁷ Friant Defs.' SUF 49,
5 citing BORESA 041538. The renewal contracts concerning Hidden
6 and Buchanan reservoirs were executed by the Bureau on February
7 14 and 15, 2001.

8 On January 5, 2001, when the Bureau requested formal
9 consultation on the Friant contracts, there was no mention of
10 the Hidden or Buchanan water contracts. Pls.' SUF 22, citing
11 NMFS AR 000526. On January 26, 2001, approximately 6 days after
12 NMFS's BiOp on the Friant Division and Cross Valley Canal Unit
13 Contracts was issued, the Bureau wrote a letter to NMFS as
14 follows:

15 We have reviewed the ESA section 7 compliance
16 documents for the Friant Division contracts including
17 your final biological opinion dated January 12, 2001.
18 We have noted that through an apparent oversight on
19 our part, the tables provided to the you [sic] as part
20 of the project description (and thus those in your
21 project description) did not include the Hidden and
22 Buchanan Contracts. However the delivery of this
23 water from H.V. Eastman and Hensley lakes is discussed
24 in your project description. In addition, we have
25 discussed this with your staff and they have confirmed
26 that the delivery of the water under the Hidden and
27 Buchanan contracts and any effects of this delivery on
28 species of concern were addressed in the referenced
29 biological opinion.

30 ⁵⁷ The Hidden and Buchanan contracts pertain to deliveries
31 from separate dams on separate bodies of water. Water from the
32 Friant Division comes from the San Joaquin River at Millerton Lake
33 and goes through Friant Dam, whereas Buchanan and Hidden Units
34 provide water through H.V. Eastman and Hensley Lakes and must go
35 through Buchanan and Hidden Dams. FWS AR 08023621.

1 On February 12, 2001, NMFS issued a letter in response to
2 the Bureau's request, asserting that NMFS did, in fact,
3 "consider the effects of the Hidden and Buchanan contracts in
4 the Biological Opinion issued to the Bureau on January 20,
5 2001."⁵⁸ Pls.' SUF 19, citing NMS AR 0008881, et seq., NMFS AR
6 000915, Pls.' SUF 50, NMFS AR 000884, 000885, 000913, 000915.
7 Consequently, the Bureau did not request formal section 7
8 consultation from NMFS on the Hidden and Buchanan contracts.
9 Pls.' SUF 52, citing NMFS AR 000526-27, 000885, 000881. No
10 biological opinion was ever issued by NMFS on the Buchanan and
11 Hidden units. Id.

12 Plaintiffs urge a violation of ESA because they claim that
13 no consultation was ever completed on the Hidden and Buchanan
14 contracts before they were signed. Alternatively, plaintiffs
15 argue that the BiOp is invalid as to the Hidden and Buchanan
16 contracts because its analysis on these water districts fails to
17 comply with ESA's rigorous standards. Pls.' Br. at 55.

18 The Bureau's letter to NMFS, after the January 20, 2001
19 BiOp was issued, noted that through an "apparent oversight on
20 [its] part," the tables provided to NMFS as part of the project
21

22 ⁵⁸ The letter reads, in pertinent part:

23 This is to confirm, in response to your letter of
24 January 26, 2001 to Dr. Rebecca Lent, that the National
25 Marine Fisheries Service did consider the effects of the
26 Hidden and Buchanan Contracts in the Biological Opinion
issued to the Bureau of Reclamation on January 20, 2001.
No further consultation on those contracts is necessary
. . . .

1 description did not include the Hidden and Buchanan units.
2 Furthermore, in the cover letter that was attached to its 2001
3 BiOp (written to the Bureau), NMFS explicitly stated that the
4 letter transmits the BiOp on the long-term renewal of the water
5 contracts "for the Friant Division and Cross Valley Canal Unit
6 Contractors," and there is no mention of the Hidden or Buchanan
7 water units. Moreover FWS, in contrast to NMFS, did request
8 formal consultation on these two units because they concluded
9 that they could not include analysis of the Hidden and Buchanan
10 units "due to insufficient time to make the necessary changes in
11 the project description and effects." FWS AR 09024885.

12 Defendants' contention that the analysis covered these two
13 contracts is also undermined by the fact that there exists
14 internal correspondences from the Bureau which explicitly
15 acknowledges that it did not request consultation on Hidden and
16 Buchanan due to a mistake on its part. An e-mail from Frank
17 Michny of the Bureau to an FWS scientist, Cay Goude, admitted
18 that there was a "glitch" in the consultation "in that Hidden
19 and Buchanan contracts were not in project description" and that
20 "[t]his has become a big issue" The Bureau recognized
21 that it did not provide the information required for the
22 consulting agencies to even consider the effects of the Hidden
23 and Buchanan units in its BiOps. FWS AR 09024886. Mr. Goude
24 was alarmed enough to forward that e-mail on to other scientists
25 working on the FWS BiOp, with one sentence which reads, "what
26 should we do. help. cay." FWS 09024886.

1 Despite all the above, the Friant and Federal defendants
2 insist that NMFS did consider the effects of Hidden and Buchanan
3 in their Friant Division/Cross Valley Canal Unit January 2001
4 BiOp. Defendants cite to a myriad of charts and discuss various
5 figures supposedly in support of that contention.

6 First, Friant defendants argue that the Hidden and Buchanan
7 units were considered in NMFS's January 2001 BiOp because there
8 is one sentence in the BiOp which states that "2 contractors in
9 the Friant Division also receive water from H.V. Eastman Lake
10 and Hensly Lake." BORESA 041538. This sentence, in and of
11 itself, is hardly convincing evidence that the Hidden and
12 Buchanan contracts were analyzed in the effects section. Both
13 defendants also point to an inconsistency in the contract
14 entitlement numbers contained in two places in the BiOp. They
15 note that the "proposed action" section of the BiOp states that
16 "Entitlements are 737,500 for Class 1 Water and 1,387,475 for
17 Class 2 for Friant Division." On the next page, they point out
18 to Table 1, which lists the "water entitlements for the Friant
19 Division," as showing for Class 1 692,802 and 1,149,477 for
20 Class 2. BORESA 041537-041539. Friant and Federal defendants
21 argue that this discrepancy of 282,695 acre-feet between the
22 water delivery amount listed in the chart and that described in
23 the "proposed action" of the BiOp reflect that the Hidden and
24 Buchanan units were, in fact, considered. They maintain that
25 this substantial difference is more than enough to cover the
26 48,000 acre-feet that was delivered from Hidden and Buchanan.

1 As I now explain, the argument is not persuasive.

2 First, accepting defendants' arguments about the
3 discrepancy in the numbers would require the court to make
4 inferences about the consultation process which simply are not
5 supported anywhere in the BiOp. As the court has noted
6 previously, "we cannot infer an agency's reasoning from mere
7 silence," and that "in considering the BiOps, we may only rely
8 on what the agency said in the record to determine what the
9 agency decided and why." Gifford Pinchot, 378 F.3d at 1072
10 (citing Reno v. Shalala, 30 F.3d 1057 (9th Cir. 1994)). Because
11 the BiOp nowhere reflects that the effects of the Hidden and
12 Buchanan units was considered, the court cannot accept
13 defendants' arguments. Secondly, plaintiffs compellingly note
14 that Table 1, which lists the "water entitlements for the Friant
15 Division," according to the 2001 BiOp, is identical to the chart
16 on Appendix D contained in FWS's 2001 CVPIA BiOp ("Mother
17 Opinion,"), which lists the water deliveries for all CVP
18 contractors. The numbers listed under Friant Division for the
19 Madera and Chowchilla districts from Appendix D match exactly
20 the water delivery amounts contained in Table 1 of NMFS's 2001
21 BiOp. In both tables, "maximum annual delivery" for Madera
22 Irrigation District is 213,500 and "maximum annual delivery" for
23 Chowchilla Water District is 168,709. The last page of Appendix
24 D identifies additional "maximum annual deliveries" from
25 "miscellaneous" units, including 24,000 for Chowchilla Water
26 District from Buchanan Unit and 24,000 acre-feet for Madera

1 Irrigation District from the Hidden Unit. FWS AR 06020481.

2 Based on the actual content of the administrative record,
3 defendants' post hoc argument that NMFS did, in fact, consider
4 the impacts of the Hidden and Buchanan contracts in its Friant
5 BiOp cannot be accepted. Because it appears that the Bureau
6 never consulted on these two units before signing the contracts
7 in February, they are in violation of ESA's mandate that
8 consultation must be complete as to the entire project before
9 the action is initiated or any of its components undertaken.
10 See Conner, 848 F.2d at 1453; Lane County Audubon Soc'y v.
11 Jamison, 958 F.2d 290, 295 (9th Cir. 1992).

12 **D. THE BUREAU OF RECLAMATION'S LIABILITY UNDER ESA**
13 **(PLAINTIFFS' FOURTH CLAIM)**

14 Plaintiffs allege that the Bureau committed resources
15 before completing ESA section 7 Consultation (plaintiffs' fourth
16 claim).⁵⁹ As discussed above, because NMFS did not issue a BiOp
17 on the Hidden and Buchanan contracts in its consultations on the
18 Friant contracts before executing the contracts, the Bureau
19 violated Section 7(d) of the Endangered Species Act.

20 Plaintiffs also argue that the Bureau violated ESA by not
21 independently ensuring that its own actions do not cause

22 ⁵⁹ The section provides:

23 the Federal agency . . . shall not make an irreversible
24 or irretrievable commitment of resources with respect to
25 the agency action which has the effect of foreclosing
26 the formulation or implementation on of any reasonable
and prudent alternative measures which would not violate
subsection (a)(2) of this section.

1 jeopardy to listed species or adverse modification to species
2 and their habitat. Defendants, on the other hand, contend that
3 the BiOps were not unlawful and the Bureau's reliance on them
4 was reasonable.

5 The Ninth Circuit has previously addressed situations in
6 which a consulting agency issued a faulty "no jeopardy" opinion
7 and the action agency adopted it. No bright line test emerges
8 from those cases, but the Circuit has concluded that an action
9 agency may not escape its responsibility under the Endangered
10 Species Act by simply relying on the consulting agency's
11 analysis. See Resources Ltd., Inc. v. Robertson, 35 F.3d 1300,
12 1304 (9th Cir. 1994); Pyramid Lake Paiute Tribe v. United States
13 Dept. of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990) ("A federal
14 agency cannot abrogate its responsibility to ensure that its
15 actions will not jeopardize a listed species"). On the
16 other hand, the Circuit has also concluded that an action agency
17 need not undertake a separate, independent analysis in the
18 absence of new information not considered by the consulting
19 agency in reaching its "no jeopardy" conclusion. See Stop H-3
20 Ass'n v. Dole, 740 F.2d 1442, 1460 (9th Cir.1984). In some
21 circumstances, the court has required the party bringing this
22 claim to "put forth new information which the consulting agency
23 did not take into account in rendering its opinion." See
24 Pyramid Lake Paitue Tribe, supra. Finally, the Circuit has also
25 upheld an action agency's adoption of a "no jeopardy" finding
26 even when based on admittedly "weak" best available evidence.

1 See Greenpeace Action v. Franklin, 14 F.3d 1324, 1336 (9th Cir.
2 1993).

3 Despite what appears to be somewhat conflicting holdings,
4 all of the cases hold that the action agency may be liable if
5 its reliance on the consulting agency's analysis was arbitrary
6 or capricious. As I now explain, the record demonstrates that
7 the Bureau's renewal under the circumstances was arbitrary and
8 capricious.

9 While numerous examples may be found, see Pls.' Br. at
10 58-60, perhaps the clearest instance of arbitrary conduct was
11 when the Bureau, knowing that FWS based its analysis on less
12 than the full contract amount, nevertheless, adopted a "no
13 jeopardy" finding. Having knowledge that FWS did not analyze
14 the action authorized, the Bureau had no reasonable basis to
15 rely on FWS's BiOp in order to bypass its own responsibility to
16 ensure that the federal action would not jeopardize listed
17 species and critical habitats. See Pyramid Lake, 898 F.2d at
18 1415. Because the Bureau failed to carry out its duty to ensure
19 against jeopardy and adverse modification, and because the
20 Bureau knew of the deficiency, the court must conclude that its
21 conduct was arbitrary and capricious.

22 ////

23 ////

24 ////

25 ////

26 ////

1 **E. REINITIATION OF CONSULTATION (PLAINTIFFS' FOURTH, FIFTH,**
2 **AND SIXTH CLAIMS)**

3 Plaintiffs' final argument is that Federal defendants were
4 required to reinitiate consultation.⁶⁰ Plaintiffs argue that a
5 2002 decision issued by Judge Wanger constituted "new
6 information" that gave rise to a duty to reinitiate consultation
7 on the long-term renewal of the Friant contracts, because it may
8 "affect listed species or critical habitat in a manner to an
9 extent not previously considered." Plaintiffs explain that in
10 February 2001, at the time the long-term contracts were signed,
11 the Bureau of Reclamation was under a duty, under Section
12 § 3406(b)(2) of the CVPIA, to dedicate and manage annually
13 ////

14
15 ⁶⁰ Reinitiation of formal consultation is required and shall
16 be requested by the Federal agency or by the Service, where
discretionary Federal involvement or control over the action has
been retained or is authorized by law and:

17 (a) If the amount or extent of taking specified in the
18 incidental take statement is exceeded;

19 (b) If new information reveals effects of the action that may
20 affect listed species or critical habitat in a manner or to
an extent not previously considered;

21 (c) If the identified action is subsequently modified in a
22 manner that causes an effect to the listed species or
critical habitat that was not considered in the biological
opinion; or

23 (d) If a new species is listed or critical habitat designated
24 that may be affected by the identified action.
50 C.F.R. § 402.16.

25 See Environmental Protection Information Center v. The Simpson
26 Timber Co., 255 F.3d 1073, 1076 (9th Cir. 2001).

1 800,000 acre-feet of CVP yield for environmental purposes.⁶¹ In
2 February 2002, a year after the contracts were signed, Judge
3 Wanger issued an order which prohibited the Department of
4 Interior from using offset/reset matrices in accounting for use
5 of water under § 3406(b)(2), to impermissibly alter the 800,000
6 acre feet of designated water by Congress. See San Louis &
7 Delta-Mendota Water Auth. v. United States, CIV F-97-6140 OWW,
8 Supp. Mem. Dec. and Order Re: Summ. Judg. Mot. at 15-17 (Feb. 5,
9 2002). The Ninth Circuit affirmed that ruling in Bay Institute
10 of San Francisco v. United States, aff'd in part, rev'd in part
11 on other grounds, 87 Fed. Appx. 637 (9th Cir. 2004).

12 Plaintiffs contend that complying with Judge Wanger's
13 ruling would have the effect of diminishing the fish protection
14 flows from CVPIA(b)(2) by approximately 400 TAF (thousand acre
15 feet), and that "there is no question that reduction for several
16 hundred thousand acre-feet in annual flows 'may affect listed
17 species or critical habitat in a manner or to an extent not
18 previously considered.'" Pls.' Br. at 62, citing Friant Defs.'
19 Motion to Augment the Record, Ex. 3, at 5.⁶² Friant defendants,

20
21 ⁶¹ Section 3406(b)(2) provides that the "primary purposes" to
22 which the 800,000 acre feet may be used to "help" meet obligations
under the Endangered Species Act and to "assist" in meeting water
quality standards.

23 ⁶² As NMFS explains in one of the documents relied on by the
24 Friant defendants:

25 In 2002 [spring-run/steelhead] OCAP opinion,
26 Reclamation was assumed to operate the CVP
using the October 1999 Federal court decision
on implementation of CVPIA b(2) flows.

1 on the other hand, argue that the Bureau and the consulting
2 agencies have already reinitiated consultation on the renewal of
3 the Friant Division contracts, but the documents they cite do
4 not support that proposition.⁶³ Friant defendants alternatively
5 argue that once the contracts were executed, Reclamation lost
6 its discretion to amend them to address the needs of threatened
7 or endangered species.

8 During oral argument, both Friant and Federal defendants
9 explained that Judge Wanger's decision relates to the entire
10 operation of the CVP, and that the decision may not specifically
11 affect the water units at issue in this litigation. Friant

12
13 Beginning in 2001, however, Federal court
14 rulings have . . . disallowed the use of
15 offset and reset rules (i.e., crediting) on
16 reservoir storage and Sacramento-San Joaquin
17 Delta pumping. Compliance with these rulings
has the effect of diminishing the fish
protection flows from CVPIA (b)(2) by
approximately 400 TAF [thousand acre feet].

18 Friant Def.'s Mot. to Augment to Admin. Record at Ex. 3, p. 5
(October 7, 2004).

19 ⁶³ Friant defendants first cite to the long-term OCAP BiOp on
20 CVP operations issued by the FWS on July 30, 2004. Friant
21 Defendants' Motion to Augment, Ex. 2, p. 23. Although there is a
22 section in that BiOp which briefly mentions Section 3406(b), it
23 clearly was not a BiOp that was written in response to a request
24 for reinitiation on the Friant contracts. Rather, the BiOp was a
25 request for formal consultation on the Operating Criteria and Plan
26 in California (OCAP), operations of the CVP, and operations of the
State Water Project (SWP). They also assert that defendants have
reinitiated consultation, citing to a request for consultation on
the renewal of interim contracts (for the period April 1, 2004 -
March 31, 2006). This interim BiOp does not cover the effects of
the twenty-five year Friant contracts and cannot be considered an
effort on the part of the Bureau to reinitiate consultation on the
Friant contracts. Friant Defendants' Motion to Augment, Ex. 3.

1 defendants explained that the decision "might" impact the
2 Friant, Buchanan, and Hidden deliveries, but that the water may
3 come from other divisions as well. Plaintiffs, however, contend
4 that since it is unclear exactly what the impacts are,
5 reinitiation is required so NMFS can consider what the impacts
6 are, and whether the Friant contracts still meet the no jeopardy
7 and no adverse modification standard under ESA.

8 Under ESA's implementing regulations, "[i]f new information
9 reveals effects of the action that may affect listed species or
10 critical habitat in a manner or to an extent not previously
11 considered," reinitiation of formal consultation is required.
12 50 C.F.R. § 402.16. Thus, the issue appears not to be whether
13 it can be determined with certainty that Judge Wanger's decision
14 would affect the units at issue in this litigation. So long as
15 new information reveals that the decision "may" affect listed
16 species, reinitiation of consultation is required under ESA.
17 Nonetheless, as I explain below, I agree with defendants that
18 reinitiation was not required.

19 As Friant defendants maintain, reinitiation of consultation
20 can only happen where "discretionary Federal involvement or
21 control over the action has been retained or is authorized by
22 law." 50 C.F.R. § 402.16; see Environmental Protection
23 Information Center v. Simpson Timber Co., 255 F.3d 1073 (9th
24 Cir. 2001).

25 Unfortunately, the parties provide no help in resolving
26 whether under the contracts the federal government retained the

1 power to amend for environmental protection. Plaintiffs fail to
2 address the issue, and the Federal defendants' brief is
3 completely silent on the issue of reinitiation of consultation.
4 Finally, the Friant defendants misread Environmental Protection
5 Information Center to hold that "[o]nce the renewal contracts
6 were executed, Reclamation lost its discretion to amend them to
7 address the needs of threatened or endangered species." Friant
8 Defs.' Br. at 57. To the contrary, in Environmental Protection
9 Information Center, the court examined the permit to determine
10 whether discretion had been retained. In like manner, this
11 court must examine the contract to determine the scope of
12 discretion, if any, retained by the Government.

13 Equally unfortunate, none of the parties have directed the
14 court to the appropriate passage(s) in the water contracts which
15 would allow the court to determine whether a specific
16 contractual provision provided discretionary power on the part
17 of the services to demand additional measures to protected
18 listed species or their critical habitat.

19 Upon the court's own examination of the Friant, Hidden,
20 and Buchanan water contracts, the court concludes that while
21 there are some provisions of the contract which allow for
22 discretion as to how much water may be delivered, none of those
23 provisions specifically relate to measures to protect endangered
24 species. For instance, Article 11(b) of the contracts recites
25 that water "may temporarily be discontinued or reduced to
26 provide for purposes of investigation, inspection, maintenance,

1 repair or replacement of any of the Project facilities." See
2 Admin. Record and Other Non-Case Material Cited in Friant
3 Defendants' Re-filed Summary Adjudication Briefs, Volume 9 of
4 10, Tabs 33 (Chowchilla Renewal Contract, exemplar for Friant),
5 36 (Hidden Contract), and 37 (Buchanan Contract). Article 12 of
6 the contracts also allows for some flexibility in the amount of
7 water delivered to the contractors if there is a shortage in the
8 quantity of water. Put directly, these contractual provisions
9 do not specifically address whether the Services have the power
10 to reinitiate consultation to protect listed species or critical
11 habitat, and indeed listed species and their critical habitat
12 are not mentioned in any of these "discretionary clauses."

13 Environmental Protection Information Center noted that even
14 though various permit documents discuss some control that FWS
15 may have had to implement conservation measures, none of the
16 measures specifically addressed the scope of FWS's authority to
17 implement measures to benefit species other than the spotted
18 owl. 255 F.3d at 1079-1084. The holding suggests that the case
19 contemplates very specific language in permits or contracts
20 explicitly retaining discretionary control to benefit protected
21 species and their critical habitat. Such language appears to be
22 absent from the contracts at issue. Accordingly, plaintiffs'
23 motion for summary judgment is denied as to this issue, and the
24 Friant defendants' motion is granted.

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26 ////

1 IV.

2 CONCLUSIONS AND ORDERS

3 For all the foregoing reasons, the court hereby ORDERS as
4 follows:

5 1. Plaintiffs' motion for summary adjudication on the
6 critical habitat inquiry is GRANTED (Plaintiffs' Sixth Claim,
7 ¶ 170; Plaintiffs' Fifth Claim, ¶¶ 164, 167).

8 2. Plaintiffs' motion for summary adjudication on the
9 jeopardy analysis is GRANTED (Plaintiffs' Fifth Claim, ¶ 165;
10 Plaintiffs' Sixth Claim, ¶¶ 171-173).

11 3. Plaintiffs' motion for summary adjudication as to the
12 Bureau of Reclamation's liability is GRANTED (Plaintiffs' Fourth
13 Claim, ¶¶ 152-156, 158, 161).

14 4. Defendants' motion as to reinitiation of consultation
15 is GRANTED (Plaintiffs' Fourth Claim, ¶ 160; Fifth Claim, ¶ 168;
16 Sixth Claim, ¶ 174).

17 IT IS SO ORDERED.

18 DATED: July 28, 2005.

19 /s/Lawrence K. Karlton
20 LAWRENCE K. KARLTON
21 SENIOR JUDGE
22 UNITED STATES DISTRICT COURT
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